DOCKET

No. 13-553

Title:	Alabama Department of Revenue, et al., Petitioners
	v.
	CSX Transportation, Inc.
Docketed:	November 1, 2013
Linked with 13A275	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(12-14611)
Decision Date:	July 1, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 13 2013	Application (13A275) to extend the time to file a petition for a writ of certiorari from September 29, 2013 to October 30, 2013, submitted to Justice Thomas.
Sep 19 2013	Application (13A275) granted by Justice Thomas extending the time to file until October 30, 2013.
Oct 30 2013	Petition for a writ of certiorari filed. (Response due December 2, 2013)
Nov 13 2013	Order extending time to file response to petition to and including December 16,2013.
Nov 27 2013	Brief amicus curiae of Multistate Tax Commission filed.
Dec 2 2013	Brief amicus curiae of American Trucking Associations, Inc. filed.
Dec 16 2013	Brief of respondent CSX Transportation, Inc. in opposition filed.
Dec 30 2013	Reply of petitioners Alabama Department of Revenue, et al. filed.
Dec 31 2013	DISTRIBUTED for Conference of January 17, 2014.
Jan 21 2014	DISTRIBUTED for Conference of January 24, 2014.
Jan 27 2014	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 27 2014	Brief amicus curiae of United States filed.
Jun 3 2014	Supplemental brief of petitioners Alabama Department of Revenue, et al. filed.
Jun 9 2014	Supplemental brief of respondent CSX Transportation, Inc. filed.
Jun 10 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Petition GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.
Jul 10 2014	Consent to the filing of amicus curiae briefs in support of either party or of neither

	party, received from counsel for the petitioners.
Jul 10 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 25 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including September 9, 2014.
Jul 25 2014	The time to file respondent's brief on the merits is extended to and including October 29, 2014.
Sep 4 2014	SET FOR ARGUMENT on Tuesday, December 9, 2014.
Sep 9 2014	Joint appendix filed. (Statement of costs filed)
Sep 9 2014	Brief of petitioners Alabama Department of Revenue, et al. filed.
Sep 16 2014	Brief amicus curiae of the United States in support of neither party filed.
Sep 16 2014	Brief amicus curiae of American Trucking Associations, Inc. filed.
Sep 16 2014	Brief amicus curiae of Multistate Tax Commission filed.
Sep 16 2014	Brief amici curiae of Alabama Cities and Counties, City of Mobile, et al. filed.
Sep 16 2014	Brief amici curiae of States of Tennessee, et al. filed.
Sep 16 2014	Brief amici curiae of State & Local Government Organizations filed.
Sep 22 2014	Record requested from U.S.C.A. 11th Circuit.
Oct 29 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 29 2014	Brief of respondent CSX Transportation, Inc. filed.
Oct 29 2014	Record received from U.S.D.C. Northern District of Alabama. The record is electronic and located on PACER.
Nov 5 2014	Brief amicus curiae of Council on State Taxation filed.
Nov 5 2014	Brief amicus curiae of Tax Foundation filed.
Nov 5 2014	Brief amicus curiae of Association of American Railroads filed. (Distributed)
Nov 7 2014	CIRCULATED.
Nov 17 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 24 2014	Reply of petitioners Alabama Department of Revenue, et al. filed. (Distributed)
Dec 9 2014	Argued. For petitioners: Andrew L. Brasher, Solicitor General, Montgomery, Ala. For United States, as amicus curiae: Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Carter G. Phillips, Washington, D. C.
Mar 4 2015	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Ginsburg, J., joined.
Apr 6 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-553

No. _____

In the
Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 30, 2013

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QUESTION PRESENTED

Three years ago, this Court granted certiorari in this case and held that a railroad could challenge certain state tax exemptions under the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. §11501(b)(4). This petition presents a question the Court expressly left open for the courts' consideration on remand. The Eleventh Circuit resolved it in a way that is contrary to the rule Justices Thomas and Ginsburg proposed in their separate opinion, and the circuits are now split 3-2 on this question. The question is as follows:

Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors.

PARTIES TO THE PROCEEDINGS

The caption identifies all parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

The Alabama Department of Revenue and its Commissioner, Julie Magee, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (CA11 2013), and reproduced at App. 1a-29a. The District Court's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 892 F. Supp. 2d 1300 (N.D. Ala. 2012), and reproduced at App. 30a-66a.

STATEMENT REGARDING JURISDICTION

CSX filed this action against the Department and Commissioner under the 4-R Act, which gives district courts subject-matter jurisdiction over these kinds of cases. *See* 49 U.S.C. §11501(c). The District Court entered final judgment in the Department and Commissioner's favor. *See* App. 67a-68a. CSX took a timely appeal, and the Eleventh Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). A divided panel entered final judgment reversing the District Court on July 1, 2013. *See* App. 1a-17a.

This Court has certiorari jurisdiction under 28 U.S.C. §1254(1). Supreme Court Rule 13 originally made this petition due on September 30, 2013. On September 19, Justice Thomas granted the Department and Commissioner an extension, up to and including October 30, 2013, to file the petition. *See* App. 94a. The Department and Commissioner are filing this petition on that date.

STATUTORY PROVISION INVOLVED

The Railroad Revitalization and Regulatory Reform Act of 1976 provides in relevant part:

49 U.S.C. §11501. Tax discrimination against rail transportation property.

...

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

INTRODUCTION

This Court reversed the Eleventh Circuit's previous decision in this matter two years ago, and the case now presents another question that is worthy of review. This matter arises under the Railroad Revitalization and Regulatory Reform Act of 1976, also known as the 4-R Act. This statute prohibits States from enforcing a sales or use tax that "discriminates against a rail carrier." 49 U.S.C. §11501(b)(4).

When this case first came to the Court, it presented a threshold question about whether a railroad can use the Act to challenge a tax because of exemptions granted to non-railroads. This Court answered the question in the affirmative. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1105 (2010). But rather than decide what standard a court should use to determine when these sorts of taxes "discriminate[]" in violation of the Act, the Court remanded to allow the lower courts to address that question in the first instance. *See id.* at 1107 n.5, 1109 n.8, 1114.

In a dissenting opinion, Justices Thomas and Ginsburg said they would have proceeded to set the standard. They reasoned that a State does not "discriminate[]" for the purposes of the Act unless its exemptions target or single out railroads as compared to the general class of commercial and industrial taxpayers as a whole. *See id.* at 1120 (Thomas, J., dissenting). These Justices noted that because the majority had not reached the issue, lower courts would be free to adopt their proposed rule. *Id.* at 1118. And these Justices noted that under this standard CSX could not possibly prevail in its challenge to Alabama's tax. *Id.* at 1117-18.

On remand, the Eleventh Circuit rejected Justices Thomas's and Ginsburg's proposed rule and exacerbated a preexisting circuit split. App. 11a n.3. The court held that a State "discriminates" against railroads under the Act when it exempts their competitors from paying a tax, even if the State does not exempt commercial and industrial taxpayers more generally. *Id.* at 11a-12a. The Eleventh Circuit held that under this standard, Alabama's tax violates the Act. *Id.* at 17a.

That decision warrants review. The Eleventh Circuit acknowledged that it was widening a circuit split and rejecting the view of Justices Thomas and Ginsburg. *Id.* at 7a-11a. Millions of dollars are at stake, for many other States offer similar exemptions. Particularly because this case has been to this Court once before, it is the optimal vehicle for resolving this important question.

STATEMENT OF THE CASE

A. The tax

This case involves a typical sales-and-use tax. Like many other States, Alabama taxes goods that businesses and people purchase or use in the State. *See* ALA. CODE §§40-23-2(1) & -61(a). As relevant here, Alabama charges 4% for diesel fuel that is used off-road—for instance, in farm equipment and trains. This litigation arose because the tax does not apply to two other types of fuel.

1. The motor-fuels exemption

First, for diesel fuel used *on* roads, Alabama imposes a motor-fuels tax of 19¢ per gallon instead. *See* ALA. CODE §40-17-325(b). Fuel that is subject to this tax is exempt from the sales-and-use tax. *See* ALA.

CODE §40-17-325(a). The motor-fuels tax helps fund road maintenance in the State. *See id.*

Trains do not operate on roads, so railroads pay the sales-and-use tax for their engines' diesel fuel. *See* App. 36a-39a. The District Court found that railroads often benefit from this arrangement. In recent years, railroads have paid lower taxes per gallon than truckers. *See id.* at 56a.

2. The interstate water carriers' exemption

Second, the Alabama Code specifically exempts interstate water carriers, such as barges, from paying the sales-and-use tax on diesel fuel. *See* ALA. CODE §§40-23-4(a)(10) & -62(12). This exemption has been around for more than 50 years—long enough that no one appears to know precisely why the legislature created it. *See* Br. of Resp'ts, *CSX Transp., Inc. v. Ala. Dept. of Revenue*, No. 09-520, 2010 WL 3806522, at *40 (Sept. 27, 2010) (citing ALA. ACT No. 1959-99). One possible explanation is that, as the Iowa Supreme Court once explained in analyzing a similar exemption, "[a]t one time barges in navigable waters were considered immune from state taxation of fuel by virtue of the Commerce Clause." *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983) (citing *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929)).

B. Procedural history

Respondent CSX, a rail carrier, brought this action in the Northern District of Alabama against the Alabama Department of Revenue and its Commissioner. App. 30a-31a. CSX alleges that Alabama law violates the 4-R Act because rail carriers pay the

sales-and-use tax while motor and water carriers do not. *Id.* at 31a.

The 4-R Act, quoted above, contains four subsections prohibiting state and local tax authorities from discriminating against railroads. *See supra* at 2 (quoting 49 U.S.C. §11501(b)). The first subsection prohibits those governments from assessing railroad-property value at a ratio that is higher than the one used for "other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. §11501(b)(1). Correspondingly, subsection (b)(2) precludes those governments from levying and collecting taxes based on the assessments prohibited in subsection (b)(1). *Id.* §11501(b)(2). Subsection (b)(3) bars these governments from levying certain property taxes on railroads at a rate exceeding the one used for "commercial and industrial property in the same assessment jurisdiction." *Id.* §11501(b)(3). The final provision, subsection (b)(4), makes it illegal for governments to "[i]mpose another tax that discriminates against a rail carrier." *Id.* §11501(b)(4).

CSX is arguing that Alabama's sales-and-use tax discriminates against railroads in violation of subsection (b)(4). CSX's complaint seeks, among other things, an injunction prohibiting the Alabama Department of Revenue and its Commissioner from collecting the tax from CSX. App. 31a.

1. This Court's decision on the threshold question

The District Court initially dismissed the action in light of Eleventh Circuit precedent, which held that the Act does not support challenges to exemptions from sales-and-use taxes. *See Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1314-15

(CA11 2008). On appeal, the Eleventh Circuit affirmed on the strength of that precedent. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 350 F. App'x 318, 319-20 (CA11 2009).

This Court granted certiorari and reversed. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011). The majority emphasized the limited nature of its decision, explaining that it was not deciding whether "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114. This Court likewise reserved the question whether the lower courts "must compare the taxation of CSX not merely to direct competitors but to other commercial entities as well" in determining whether exemptions amount to "discrimination." *Id.* at 1107 n.5. This Court instead confined its holding to the threshold proposition "that CSX may challenge Alabama's sales and use taxes as 'tax[es] that discriminat[e] against . . . rail carrier[s]' under §11501(b)(4)." *Id.* at 1114 (alterations in original). This Court therefore remanded for the lower courts to determine the proper standard for gauging discrimination and whether, under that standard, Alabama's sales-and-use tax is illegal. *See id.*

Justice Thomas, joined by Justice Ginsburg, wrote a separate opinion. *See id.* at 1114-20 (Thomas, J., dissenting). Although these Justices agreed with the majority's answer to the threshold question, they dissented from the Court's decision to remand the case for further proceedings. *See id.* at 1114-15. They would have proceeded to address the question, left open by the majority, of the appropriate standard for gauging discrimination. They would have held that exemptions do not "discriminate[]" against a rail

carrier so long as they do not single out or target rail carriers as compared to the general class of commercial and industrial taxpayers as a whole. *See id.* at 1115-17. Because CSX did not allege that Alabama's tax works that way, these Justices would have held that CSX's complaint was due to be dismissed. *See id.* at 1117.

2. Proceedings on the discrimination question

On remand, the State defended the exemptions by noting, among other things, that motor carriers pay the motor-fuels tax. App. 70a-80a. The State also expressly preserved Justices Thomas's and Ginsburg's comparison-class point, arguing at trial that "the dissenting opinion in the Supreme Court, Justices Thomas and Ginsburg, got the standard as to whether the state has singled out the railroad for discrimination, which the state believes it has not." Doc. 65 at 12.

a. The District Court's decision

After conducting a bench trial, the District Court upheld the tax. App. 30a-31a. The court noted that due to the motor-fuels tax, "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a. The court also held that CSX had not established any "discriminatory effect as it relates to water carriers." *Id.* at 63a-64a.

b. The Eleventh Circuit's decision

On appeal, the Department and Commissioner defended the District Court's reasoning. *See* Br. of Appellees, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, CA11 No. 12-14611, at 21-35 (Nov. 13, 2012). They

also argued, in the alternative, that the Eleventh Circuit should uphold the District Court's judgment on Justices Thomas's and Ginsburg's rationale. *See id.* at 36-37 (citing *CSX Transp.*, 131 S. Ct. at 1115 (Thomas, J., dissenting)). The Eleventh Circuit turned away both arguments, holding that "exempting CSX's main competitors from the State's sales tax is discriminatory as to rail carriers." App. 2a.

The Eleventh Circuit began by rejecting the comparison class Justices Thomas and Ginsburg proposed. *Id.* at 7a-12a. The court noted that "[a]mong our sister circuits there are essentially two camps." *Id.* at 7a-8a. The first uses an approach like Justices Thomas and Ginsburg, comparing "the rail carriers to other 'commercial and industrial' taxpayers" and deeming an exemption unlawful if it applies to that general class of taxpayers but not the railroads. *Id.* at 8a-10a. In contrast, "the Eighth Circuit has endorsed the narrower 'competitive approach' model," which asks whether the rail carriers' competitors are exempt. *Id.* at 10a. If so, then the tax is unlawful even if other commercial and industrial businesses must pay it. *See id.* The Eleventh Circuit concluded that in light of the 4-R Act's purpose of ensuring "'financial stability'" for rail carriers, the "competitive" model was the correct one for assessing Alabama's tax. *Id.* at 11a.

The Eleventh Circuit found that the State had not justified its exemptions of the railroads' competitors. *Id.* at 12a-17a. The court refused to consider whether the motor-fuels tax could justify the exemption for on-road diesel because, the court said, the "fairness of those arrangements is too difficult and expensive to evaluate." *Id.* at 13a (internal quotation marks

omitted). The court held that because "[r]ail carriers pay the State's sales tax" and "motor and water carriers do not," the tax violates the 4-R Act. *Id.* at 16a-17a.

Judge Cox dissented. *Id.* at 19a-31a. He agreed with his colleagues "that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. But he would have held that the "exemption for interstate motor carriers" was lawful because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* Meanwhile, he believed that "the district court improperly placed the burden on CSX" to prove the water-carrier exemption's discriminatory effect, so he would have "remand[ed] for reconsideration as to interstate water carriers." *Id.*

REASONS THE COURT SHOULD GRANT CERTIORARI

The need for this Court's review is paramount. The Eleventh Circuit acknowledged that it was deepening an entrenched circuit split over what the 4-R Act means. In so doing, it erroneously rejected the approach Justices Thomas and Ginsburg advocated. Millions in state- and local-government revenues turn on the question. This Court should resolve it now.

A. The lower courts are divided on the question presented.

When this case was last before this Court, Justices Thomas and Ginsburg noted that "[t]he lower courts have split over the proper scope of the comparison class." *CSX Transp.*, 131 S. Ct. at 1118 n.3 (Thomas, J., dissenting). The split is deeper now, with one additional court on each side. Three circuits now agree that taxes unlawfully discriminate under subsection (b)(4) if they target railroads in comparison to commercial and industrial taxpayers as a whole. Meanwhile, the Eleventh Circuit joined the Eighth Circuit and Minnesota Supreme Court in holding that taxes may violate subsection (b)(4) when they are paid by commercial and industrial taxpayers as a general matter but not by railroads' competitors.

1. The Fifth, Seventh, and Ninth Circuits define the comparison class as commercial and industrial taxpayers.

Three courts of appeals have adopted the rule Justices Thomas and Ginsburg proposed.

Fifth Circuit. The first Court of Appeals to consider this question, the Fifth Circuit, rejected the

proposition that "a tax analyzed under §11503(b)(4) . . . should be compared with taxes against competitive modes of transportation." *Kan. City S. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (CA5 1987). Instead, the court held, "the best course is to require that the railroads be taxed only under taxes applicable to 'other commercial and industrial' taxpayers." *Id.*

Ninth Circuit. The Ninth Circuit followed the Fifth Circuit and held "that the proper comparison class to use in analyzing discriminatory taxation of the railroads under the 4-R Act is 'all other commercial and industrial taxpayers subject to the taxes.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (CA9 1996). The Ninth Circuit therefore held that a district court "erred" when it "compared the treatment of the railroads with the treatment of their major competitors, motor carriers." *Id.* Citing the Fifth Circuit's decision in *McNamara*, the Ninth Circuit concluded that "the proper comparison class for determining whether the Arizona transaction privilege tax and use tax violate subsection (b)(4) of the 4-R Act is 'all industrial and commercial taxpayers who are subject to the tax.'" *Id.* at 441-42.

Seventh Circuit. More recently, the Seventh Circuit noted that "the proper approach toward defining the appropriate class for comparison under subsection (b)(4) has divided the circuits, and the Supreme Court's most recent decision in this area, *CSX Transportation,* declined to resolve the split." *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (CA7 2011) (citing *CSX Transp.*, 131 S. Ct. at 1107 n.5; *id.* at 1115, 1118 n.3 (Thomas, J., dissenting)). In an opinion by Judge Wood, the Seventh Circuit then sided with the Fifth and Ninth Circuits. It held that

"the appropriate comparison class for subsection (b)(4)" is the "group of all other commercial and industrial taxpayers." *Id.* at 509.

2. The Eighth and Eleventh Circuits and the Minnesota Supreme Court define the comparison class as railroads' competitors alone.

The Eleventh Circuit in this case embraced the contrary rule, which the Eighth Circuit and Minnesota Supreme Court previously had adopted.

Eighth Circuit. The Eighth Circuit, while acknowledging other courts' different view, held that in the context of a sales-and-use tax, "a comparison class of competitors is more appropriate." *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (CA8 1999). The Eighth Circuit later reaffirmed that rule. *See Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (CA8 2007).

Minnesota. The Minnesota Supreme Court has the same rule. *See Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993). Recognizing that other courts had looked to "other commercial and industrial taxpayers in general," the Minnesota court held that using "the railroad's competitors as the comparison class" is "the proper approach" when "the railroad is subject to a general tax but its competitors are not." *Id.*

Eleventh Circuit. With the Eleventh Circuit weighing in after this Court's decision—and, as noted above, the Seventh Circuit contemporaneously weighing in on the other side—the split is more pronounced now than it was when this Court flagged the issue two years ago. The Eleventh Circuit did suggest that it might use a different comparison class

when some other tax was at issue, *see* App. 11a-12a n.4, but that dictum cannot be squared with the way this Court has said statutory interpretation works. This Court has "forcefully rejected" any suggestion that judges can engage in the "interpretive contortion" of "giving the same word, in the same statutory provision, different meanings in different factual contexts." *United States v. Santos*, 553 U.S. 507, 522-23 (2008) (plurality opinion) (emphasis omitted). To do so, this Court has emphasized, "would render every statute a chameleon." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). In light of these principles, future Eleventh Circuit panels will not be able to interpret subsection (b)(4) differently in different contexts.

It is important for this Court to resolve the split now. Alabama stands to lose what it understands to be at least $5 million each year in revenues, and may face refund claims exceeding $10 million, as a result of the Eleventh Circuit's decision. The state legislature cannot fix the problem easily, given that truckers already pay the separate, motor-fuels tax.

Although this question thus matters a great deal to Alabama, it is of nationwide significance as well. The validity of laws in many other States turns on the proper answer to the question presented. *See, e.g.*, *Ill. Cent. R. Co. v. Tenn. Dep't of Revenue*, No. 3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013) (using the Eleventh Circuit's approach to enjoin Tennessee law); *Kan. City S. Ry. Co. v. Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (using the Eighth Circuit's approach to enjoin similar Louisiana law); Br. of Multistate Tax Commission as *Amicus Curiae* in Support of Resp'ts, *CSX Transp., Inc. v. Ala. Dep't of Revenue*,

No. 09-520, 2010 WL 3934616, at *26 n.17 (Oct. 4, 2010) (documenting a large number States that exempt motor fuels from sales taxes). And the very presence of a split among five circuits shows that this question's importance goes far beyond any one State's borders. CSX rightly noted, when it previously sought certiorari in this case, that a State's power to tax "should not depend solely on the Circuit in which the State happens to be located." Pet. for Writ of Cert., *CSX Transp., Inc. v. Ala. Dep't of Revenue*, No. 09-520, 2009 WL 3550821, at *10 (Oct. 28, 2009). As was true then, "[t]his Court should grant review to resolve" a "fundamental and acknowledged conflict over the provision's scope." *Id.*

B. This case is an ideal vehicle for resolving this question.

This case is the right vehicle, for three reasons, to resolve this split.

1. This case presents this question cleanly.

First, the record is properly developed. The District Court conducted a trial and made detailed findings about these exemptions. App. 33a-41a. The Eleventh Circuit, at the State's request, squarely ruled on the question presented. *Id.* at 7a-12a. The court addressed both the split and Justices Thomas's and Ginsburg's contrary view. App. 8a, 11a n.3. So this question is cleanly before this Court.

That said, although the Eleventh Circuit squarely addressed the question, it also claimed that the State previously had "stipulated" in the District Court that "the proper comparison class for this case was CSX's competitors." App. 11a-12a. The Eleventh Circuit's

understanding was mistaken and should not stand in the way of this Court's review.

To the extent that the Eleventh Circuit was claiming that the State had formally "stipulated" to this matter in the District Court, that assertion was simply wrong. The parties submitted several "agreed and proposed facts and proposed conclusions of law" to the District Court before the bench trial, Doc. 63, and those stipulations did not include any agreed-upon provision defining the appropriate comparison class under subsection (b)(4). *See* Doc. 63 at 1-6 (agreed facts), 8-9 (agreed conclusions of law). To the contrary, while CSX proposed a stipulation that most courts had held that "the appropriate comparison class to determine whether discrimination exists is the class of competitive modes of transportation," the State did not agree to that stipulation. *Id.* at 10. Instead, the State proposed a stipulation noting that Justices Thomas and Ginsburg had stated that "the best way to read [§11501](b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers." *Id.* at 13-14 (alteration in original). The State likewise proposed a separate stipulation taking note of a district-court opinion holding "the proper comparison class to be other commercial and industrial taxpayers." *Id.* at 14 (citing *Burlington N. Santa Fe R. Co. v. Monroe*, No. 97-D-1754-N (N.D. Ala. Aug. 10, 1998)). CSX agreed with neither of those stipulations. So the Eleventh Circuit was wrong if it believed that these stipulations resolved the comparison-class question, and the District Court never said they did.

What the District Court did say, based on its reading of post-trial briefs that are included in the

appendix to this petition, was that "it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act." App. 45a (citing App. 70a-71a, 88a-89a). Yet the filings the District Court cited do not evince that purported agreement. The State's briefs did defend the competitors' exemptions. *See* App. 71a-80a, 89a-90a. But the State simultaneously noted Justices Thomas's and Ginsburg's finding that "'the best way to read [§11501](b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers,' and thus, [CSX's] challenge was correctly dismissed." App. 70a-71a, 88a. The State closed each of its briefs by arguing that "Alabama's sales and use tax on diesel fuel is *generally applicable* and is not 'another tax that discriminates against a rail carrier' in violation of the 4-R Act as it *does not single out or target railroads for discrimination*, but merely imposes a differently labeled tax on the same gallon of diesel fuel as that purchased by CSX[]'s competitors *and/or other commercial taxpayers*." App. 80a, 91a (emphasis added). And the State specifically argued at the bench trial that "the dissenting opinion in the Supreme Court, Justices Thomas and Ginsburg, got the standard as to whether the state has singled out the railroad for discrimination, which the state believes it has not." Doc. 65 at 12. The State thus consistently argued that it could win under *either* view of the comparison class.

Even if the State had not preserved this argument in this way, any legal positions it had advocated in the District Court would be irrelevant to the certiorari calculus in light of what happened in the

Eleventh Circuit. This Court has long noted that it is not "bound to accept" even the "stipulations" of a party when it comes to "questions of law." *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 51 (1939). And having prevailed in the District Court, the State was entitled, in the Eleventh Circuit, to "defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). The State's merits brief to the Eleventh Circuit therefore both defended the District Court's reasoning and urged the appellate court to affirm "on the alternative, broader theory, espoused by Justices Thomas and Ginsburg." Br. of Appellees, *CSX Transp., Inc. v. Ala. Dep't of Revenue*, CA11 No. 12-14611, at 36 (Nov. 13, 2012). The Eleventh Circuit had a duty to consider this question of law regardless of what the parties had said in the District Court, and the Eleventh Circuit squarely addressed the matter. *See* App. 7a-12a. This question is thus squarely before this Court.

2. This case's outcome turns entirely on the question presented.

This petition also is the right vehicle to address the lower-court conflict because the split's resolution will be outcome-determinative in this particular case. CSX has never denied that if the relevant comparison class is "general commercial and industrial taxpayers," then it is due to lose. *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting). Indeed, the Eleventh Circuit acknowledged that comparing "CSX to all of the State's taxpayers, [CSX] is no worse off because most taxpayers pay the sales tax when they purchase diesel fuel." App. 7a. CSX prevailed in the Eleventh Circuit only by persuading that court to

adopt the competitor-focused standard. The case thus provides this Court with precisely the sort of concrete factual backdrop against which this question should be resolved.

3. The Eleventh Circuit's decision is wrong.

This case is also the right vehicle because the Eleventh Circuit is on the wrong side of the split. For the reasons Justices Thomas and Ginsburg have given, the term "discriminates" in subsection (b)(4) refers to disparate treatment of the railroads as compared to commercial and industrial taxpayers generally. *See CSX Transp.*, 131 S. Ct. at 1115-17. The Eleventh Circuit's contrary approach cannot be reconciled with the text, structure, and purpose of the Act.

The text and structure are straightforward. As multiple members of this Court have noted, "the word 'discrimination' is inherently" ambiguous. *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 592 (1983) (opinion of White, J.). The term's "precise contours" always "depend on its context." *CSX Transp.*, 131 S. Ct. at 1115 (Thomas, J., dissenting). And context here, in the form of the 4-R Act's structure, makes the appropriate comparison class clear. Subsections (b)(1), (b)(2), and (b)(3) forbid States from treating railroads unequally not in comparison to their competitors, but to "other commercial and industrial property" generally. 49 U.S.C. §11501(b)(1)&(3). The next, critical provision, subsection (b)(4), bars the State from enforcing "*another* tax that discriminates against a rail carrier." *Id.* §11501(b)(4) (emphasis added). This "residual clause" and its use of the word "another" can only be understood as referring to taxes that treat railroads differ-

ently in comparison to the same group of taxpayers referenced in the first three subsections. *CSX Transp.*, 131 S. Ct. at 1116 (Thomas, J., dissenting).

It is not a good response to maintain, as have the Eighth and Eleventh Circuits, that railroads' competitors must be the appropriate class because "Congress 'specifically chose to omit any reference to a comparison class in subsection [(b)(4)].'" App. 11a-12a n.4 (quoting *Atchison*, 78 F.3d at 445 (Nielsen, J., dissenting)) (alteration in original). Nothing in the statute suggests that Congress, by virtue of the language it used in subsection (b)(4), was signaling that courts should use a different comparison class. To the contrary, the phrase "*another* tax that discriminates" harkens back to the other three subsections and made it unnecessary to repeat the comparison-class language. 49 U.S.C. §11501(b)(4) (emphasis added). And even if there were some reason to think that another comparison class was appropriate for (b)(4) cases, no one has pointed to any text suggesting that competitors are that class. The courts on the Eleventh Circuit's side of this issue came up with that theory on their own.

The Eleventh Circuit's decision was so unmoored from the statute's text that, as noted above, the court left open the possibility of reading the word "discriminates" differently and thus using other comparison classes in different factual contexts. *See* App. 11a-12a n.3 & n.4. As also noted above, that reasoning was flatly inconsistent with the courts' "obligation to maintain the consistent meaning of words in statutory text." *Santos*, 553 U.S. at 523 (plurality opinion). Whenever a lower court justifies its interpretation of a statute by invoking a principle that seven Justices

have rejected as not simply erroneous but "dangerous," *Clark*, 543 U.S. at 386, it is exceedingly likely that the lower court's interpretation is wrong.

The Eleventh Circuit' reasoning about the statute's purpose was equally unpersuasive. Noting that one of the Act's goals was "ensuring 'financial stability' for rail carriers," the Eleventh Circuit concluded that "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" this goal. App. 11a. For reasons Justices Thomas and Ginsburg have already given, that has things precisely backwards. Congress passed the 4-R Act because railroads, due to their "nonvoting, often nonresident" status, had become "'easy prey for State and local tax assessors.'" *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting) (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 336 (1994) (quoting *W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, p. 3 (1969))))). Congress's solution was emphatically not to tie governments' treatment of the railroads to their treatment of other interstate shippers—a class of businesses that were equally "nonvoting," "nonresident," "easy prey" for local regulators. *Id.* Congress instead tied the railroads' fate to commercial and industrial taxpayers as a whole—a larger class with substantially more local sway. Justices Thomas's and Ginsburg's rule thus protects the railroads *more*, not less, than the Eleventh Circuit's. Indeed, when the Fifth Circuit first adopted this standard, it struck down a tax that would not have been deemed discriminatory if the comparison class had been limited to the railroads' competitors. *See McNamara*, 817 F.2d at 375.

The contrary approach taken by the Eighth and Eleventh Circuits has moved the 4-R Act far away from its text and its original purpose. This case is the right vehicle to get the statute back on track.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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October 30, 2013

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14611

D.C. Docket No. 2:08-cv-00655-AKK

CSX TRANSPORTATION, INC.,

Plaintiff – Appellant,

versus

ALABAMA DEPARTMENT OF REVENUE, COMMISSIONER, ALABAMA DEPARTMENT OF REVENUE,

Defendants – Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 1, 2013)

Before WILSON and COX, Circuit Judges, and BOWEN,* District Judge. WILSON, Circuit Judge:

The State of Alabama (State) imposes a 4% sales tax on the gross receipts of retail businesses, and a 4% use tax on the storage, use, or consumption of tangible personal property. *See* Ala. Code §§ 40-23-2(1), -61(a).[1] Appellant CSX Transportation, Inc. (CSX), an interstate rail carrier, pays the 4% sales tax whenever it purchases diesel fuel in the State. CSX's main competitors in the State—interstate motor and water carriers—do not. In this appeal, we must decide whether exempting CSX's main competitors from the State's sales tax is discriminatory as to rail carriers in violation of the Railroad Revitalization and Regulation Reform Act of 1976 (4-R Act), 49 U.S.C. § 11501(b)(4). We conclude that the sales tax is indeed discriminatory and that the State has not offered a "sufficient justification" for exempting CSX's competitors. *See CSX Transp., Inc. v. Ala. Dep't of Revenue* (*CSX II*), — U.S. —, 131 S. Ct. 1101, 1109 n.8 (2011) ("Whether the railroad will prevail . . . depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers."). Accordingly, we reverse.

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*Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

[1] For purposes of clarity, both taxes will be referred to as the "sales tax."

I. BACKGROUND

Rail carriers, motor carriers, and water carriers all compete for the shipment of freight in interstate commerce. Although all three purchase diesel fuel toward that end, the State taxes each competitor's purchases differently: water carriers pay no tax whatsoever on their diesel fuel purchases, *see* Ala. Code § 40-23-4(a)(10); rail carriers pay the State's 4% sales tax; and motor carriers pay an excise tax of 19¢ per gallon, *see* Alabama Terminal Excise Tax Act (fuel excise tax), 2011 Ala. Act 565 (effective October 2012).[2]

The State distributes the revenue from the fuel excise tax as follows: for every gallon sold, 13¢ goes to the Alabama Department of Transportation for the construction, repair, maintenance, and operation of public roads and bridges, and the payment of principal and interest on highway bonds; the remaining 6¢ goes to cities and counties for the construction and maintenance of roads and bridges, and to the Department of Transportation for general

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[2] During the majority of this litigation, the State codified its fuel excise tax at section 40-17-2 of the Alabama Code. In October 2012, the State repealed that section and modified its motor fuel tax scheme. *See* Alabama Terminal Excise Tax Act, 2011 Ala. Act 565 (effective October 2012). The new statute changes the timing of the tax's imposition, but the amount of the excise tax (19¢/gallon of diesel fuel) remains the same, and it still exempts motor carriers from paying the State's sales tax on diesel-fuel purchases. For purposes of clarity, both taxes will be referred to as the "fuel excise tax."

highway purposes. Revenue from the sales tax, on the other hand, goes toward a general revenue fund. *See* Ala. Code §§ 40-23-35, 40-23-85.

It is axiomatic that a state has broad discretion in the exercise of its taxing power. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S. Ct. 1001, 1003 (1973); *Weissinger v. White*, 733 F.2d 802, 805 (11th Cir. 1984). That discretion will be reined in, however, where it offends a "specific federal right." *Lehnhausen*, 410 U.S. at 359, 93 S. Ct. at 1003. At issue here are the federal rights Congress has afforded rail carriers pursuant to the 4-R Act. That Act provides that a state may not:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

> (4) *Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.*

49 U.S.C. § 11501(b) (emphasis added).

Enacted to "restore the financial stability of the railway system of the United States," the 4-R Act "target[s] state and local taxation schemes that discriminate against rail carriers." *CSX II*, 131 S. Ct. at 1105 (internal quotation marks omitted). CSX contends that the State's sales tax discriminates against it in violation of § 11501(b)(4) because CSX's main competitors do not pay the sales tax when they purchase diesel fuel, giving them a competitive advantage over CSX.

CSX filed this lawsuit against Alabama's Department of Revenue and its Commissioner in 2008. After the district court dismissed the complaint, we affirmed the dismissal based on our precedent in *Norfolk Southern Railroad Co. v. Alabama Department of Revenue*, 550 F.3d 1306, 1316 (11th Cir. 2008), which established the rule that a railroad could not challenge its competitors' exemptions from a sales tax as discriminatory under the 4-R Act. *See CSX Transp., Inc. v. Ala. Dep't of Revenue* (*CSX I*), 350 F. App'x 318, 319 (11th Cir. 2009) (per curiam). CSX appealed, and the Supreme Court granted certiorari, overruled our decision in *Norfolk*, and held that "CSX may challenge Alabama's sales and use taxes as tax[es] that

6addox6t6ate[e] against rail carrier[s] under § 11501(b)(4)." *CSX II*, 131 S. Ct. at 1114 (alterations in original) (internal quotation marks omitted). The Court appeared to impliedly assume that the State's exemptions for CSX's competitors would be discriminatory unless "the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers." *Id.* at 1109 n.8.

After we remanded the case back to the district court, the court conducted a bench trial and issued an order holding that the State's sales tax did not discriminate against CSX in violation of § 11501(b)(4). *See CSX Transp. Inc. v. Ala. Dep't of Revenue* (*CSX III*), 892 F. Supp. 2d 1300, 1317 (N.D. Ala. 2012). The district court reasoned that because the State's motor carriers paid a roughly equivalent amount in taxes pursuant to the State's fuel excise tax, the motor carriers' exemption from the sales tax was not discriminatory. *Id.* at 1313 (finding that "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same"). As to the water carriers, the district court held that CSX had offered "no evidence regarding the purported discriminatory effect as it relates to water carriers." *Id.* at 1316. The district court dismissed the matter, and this appeal followed.

II. ANALYSIS

We review the district court's application of the 4-R Act de novo, *see Alphamed, Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1285 (11th Cir. 2004), taking

special heed of the guidance provided by the Supreme Court in *CSX II*. "'Discrimination,'" the Court wrote, "'is the failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *CSX II*, 131 S. Ct. at 1108 (quoting Black's Law Dictionary 534 (9th ed. 2009)). For example, "[t]o charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter." *Id.* A tax exemption is analogous because the "State takes the favored group's rate down to 0%." *Id.* Therefore, *CSX II*'s holding suggests that a tax exemption disfavoring a rail carrier creates a rebuttable presumption of discrimination, unless the State can "offer[] a sufficient justification for declining to provide the exemption at issue to rail carriers." *Id.* at 1110 n.8.

A. Comparison Class

Before we address whether the exemption at issue is discriminatory, there remains a first-order question that the Court left untouched and has yet to be answered in this circuit: against what do we compare the railroads? The matter is one of scope, as any model of discrimination requires a fixed set of participants. If we compare CSX to all of the State's taxpayers, it is no worse off because most taxpayers pay the sales tax when they purchase diesel fuel. On the other hand, if we compare CSX to motor and water carriers, questions of favorable treatment arise because they do not pay the sales tax. Among our

sister circuits there are essentially two camps: the functional approach and the competitive approach.

We acknowledge that the question of the proper comparison class has not been the central inquiry of this appeal. In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers. Although we ultimately conclude that the competitive approach is appropriate in this circumstance, we are obliged to say a few words concerning the diversity of opinions on this matter.

Employing the functional approach, the Seventh and Ninth Circuits have compared the rail carriers to other "commercial and industrial" taxpayers based on § 11501(b)(4)'s three preceding subsections, which all contain the phrase "commercial and industrial." *See Kansas City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (7th Cir.), *cert. denied*, 132 S. Ct. 855 (2011); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (9th Cir. 1999). For example, in *Koeller* the Seventh Circuit considered whether an Illinois subdivision's method of calculating taxes discriminated against railroads in violation of § 11501(b)(4). Seven hundred taxpayers comprised the tax base of the subdivision: eight of the 700 taxpayers were railroads, pipelines, and utilities (RPU properties). *Koeller*, 653 F.3d at 500. Of the remaining 692 taxpayers, 14 conducted commercial and industrial operations, several were residents, and the vast majority used the land for agricultural

purposes. *Id.* After severe floods and an increase in the price of diesel fuel sent the subdivision into a budgetary crisis, its commissioners increased the annual maintenance assessment—which for all intents and purposes was a "tax." *Id.* Although the majority of the subdivision's landowners saw modest hikes in their annual assessments, the RPU properties saw "astronomical increase[s]." *Id.* at 502. Norfolk Southern's assessment, for instance, jumped a whopping 8,300% in one year, from $1,126 to $93,920. *Id.*

Before reaching the question of whether the tax was discriminatory, the Seventh Circuit acknowledged the different comparison-class options at its disposal. The court opted for the functional approach, in part because of "the need to read subsection (b)(4) in light of the approach taken in the first three subsections of the 4-R Act, which all directly or indirectly look to other commercial and industrial property." *Id.* at 509 (internal quotation marks omitted). Yet the Seventh Circuit also recognized that "there are *no* competitors of the railroads—motor carriers, air carriers, barges, [or] Great Lakes ships—that [the subdivision] is trying to tax." *Id.* (alteration in original) (emphasis in original) (internal quotation marks omitted). Therefore, opting for the competitive approach in *Koeller* would have yielded the bizarre result that a tax singularly raising a rail carrier's tax rate by 4,800% was not discriminatory. With that in mind, the court compared the rail carriers with "the 14 additional commercial and industrial taxpayers" who did not

suffer such a dramatic increase in their tax obligations, and held that the tax was discriminatory. *Id.* at 509–10.

Contrarily, the Eighth Circuit has endorsed the narrower "competitive approach" model, at least when considering a state's sales tax. *See Union Pac. R.R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) (choosing the competitive model, but acknowledging that "the comparison class should be appropriate *to the type of tax and discrimination* challenged in a particular case" (emphasis added)). In *Lohman*, the Eighth Circuit addressed a scenario identical to the one before us: whether an exemption to Missouri's sales tax caused the sales tax to violate § 11501(b)(4). *See Lohman*, 193 F.3d at 984. In that case too, motor carriers paid a fuel excise tax rather than a sales tax. *Id.* at 985. The court ultimately held that "the proper comparison class for Missouri sales and use taxes is the competitive mode." *Id.* at 986. Paying homage to the 4-R Act's broad purpose of restoring the railroads' financial stability, the court emphasized that "[s]tability cannot be restored without making the railroads competitive." *Id.* Furthermore, the court continued, if Congress "had wanted [§ 11501(b)(4)] to have the same comparison class as the property tax subsections, and none other, it would have written it that way." *Id.*; *see also Atchison*, 78 F.3d at 445 (Nielsen, J., dissenting) ("If Congress wanted [§ 11501(b)(4)] to share the same broad comparison class as the three preceding

subsections, and none other, it would have said so. It did not."). This result made sense, the court reasoned, because a broad comparison class in that instance would have put the railroads "at a competitive disadvantage." *Lohman*, 193 F.3d at 986.

We have carefully studied the different approaches available to us, and we conclude that in light of the 4-R Act's purpose of ensuring "financial stability" for rail carriers, the competitive model best serves that goal in the context of a state's sales tax on diesel fuel.[3] Moreover, CSX and the State stipulated, and the district court agreed, that the proper comparison class for this case was CSX's competitors.[4] Having determined that the

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[3] We therefore decline to adopt Justices Thomas's dissent in *CSX II*, which would have held that the appropriate comparison class in all 4-R Act discrimination cases is all commercial and industrial taxpayers. *See CSX* II, 131 S. Ct. at 1115 (Thomas, J., dissenting) ("I would hold that, to violate § 11501(b)(4), a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers."). While this comparison class might be appropriate in certain situations, like *Koeller*, it fails to address discriminatory taxes that place rail carriers at a significant disadvantage vis-à-vis their competitors.

[4] Our approach creates tension with the Seventh Circuit's holding in *Koeller* only to the extent that *Koeller* established a bright-line rule for § 11501(b)(4) cases. *See Koeller*, 653 F.3d at 509 ("Given our preference for clarity, however, rather than an ill-defined 'all the circumstances' type of test, we are content for now to endorse reference to other commercial and industrial users."). While we recognize the virtues of bright-line rules, § 11501(b)(4) is a broad statute, designed to strike down all discriminatory taxes that place rail carriers at a competitive

appropriate comparison class is CSX's competitors, we turn to the question of whether the sales tax is discriminatory.

B. Discrimination

As noted earlier, the Supreme Court held that tax exemptions can be discriminatory under the 4-R Act. *CSX II*, 131 S. Ct. at 1114. Given that we have opted for a competitive model in this case, and CSX's competitors do not pay the State's sales tax, we hold that CSX has established a prima facie case of discrimination. Quite simply, the sales tax overburdens the rail carriers because its competitors do not pay it. It therefore becomes the State's burden to justify its discriminatory tax. *See id.* at 1110 n.8.

The State devotes the majority of its brief to defending the motor carriers' exemption to the sales tax on the ground that the motor carriers pay a roughly equivalent amount of taxes under the fuel excise tax. This argument misses the mark. Rather than framing the tax in question at its highest level of abstraction as "all the taxes paid on diesel-fuel purchases," we agree with the Eighth Circuit that

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disadvantage—and Congress "specifically chose to omit any reference to a comparison class in subsection [(b)(4)]." *Atchison*, 78 F.3d at 445 (Nielsen, J., dissenting). Thus, while a malleable approach might not lend itself to the most efficient application, the language and purpose of § 11501(b)(4) require that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." *Lohman*, 193 F.3d at 986.

"we look only at the sales and use tax with respect to fuel to see if discrimination has occurred." *Union Pacific*, 507 F.3d at 695 (internal quotation marks omitted). We are persuaded that even though in some years—depending on the price of diesel fuel—the State's taxing arrangement might yield a fair result, "the actual fairness of those arrangements is too difficult and expensive to evaluate." *Lohman*, 193 F.3d at 986 (quoting *Trailer Train Co. v. State Tax Comm'n*, 929 F.3d 1300, 1303 (8th Cir. 1991)).

This construction of the 4-R Act finds support in the Act's text. Section 11501(b)(4) prohibits the states from "impos[ing] another tax that discriminates against a rail carrier," but the statute hardly "suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state." *Kansas City S. Ry. V. McNamara*, 817 F.2d 368, 377 (5th Cir. 1987). If the 4-R Act required us to examine the tax regime for an entire commodity, it would have said so rather than speaking in the singular about "another tax." Like the Eighth Circuit in *Lohman*, we find the Fifth Circuit's well-reasoned opinion in *McNamara* to speak directly on this issue.

In *McNamara*, the Fifth Circuit struck down a Louisiana tax imposed on transportation and communication utilities, which included rail carriers. *Id.* at 370. Using a commercial and industrial taxpayer comparison class, the Fifth Circuit held that the tax was discriminatory, and that Louisiana could not justify it based on the fact that other

commercial and industrial taxpayers paid a roughly equivalent amount in sales and use taxes. *Id.* at 377. Refusing to consider the sales tax, the Fifth Circuit held that "[d]etermining the intrinsic economic fairness of a tax system to a particular taxpayer is a paradigm of the kind of polycentric problem for which courts are ill-suited." *Id.*

McNamara provided the rationale for the Eighth Circuit in *Lohman* and its progeny to hold that courts should not evaluate a state's sales tax against other taxes in the state's code. *See Lohman*, 193 F.3d at 986. Here, the district court below rejected the Eighth Circuit's reliance on *McNamara* because *McNamara* employed the functional approach rather than the narrower competitive approach, and when the comparison class is thereby "drastically reduced" it does not "impose substantial theoretical and practical difficulties on a court." *CSX III*, 892 F. Supp. 2d at 1311. Because the comparison class has been narrowed, the dissent assures us, federal courts would not engage in "such a searching, time-consuming, expensive, and impracticable analysis." Dissenting Op. at 6. We disagree.

Although the class of taxpayers might have been narrower had we opted for the functional approach, the "theoretical difficult[ies]" that concerned the *McNamara* court would remain. *McNamara*, 817 F.2d at 377. We would still be forced to decide whether a state's fixed-percentage sales tax for one market participant is roughly equivalent to an *ad valorem* excise tax for another market participant. In

addition, the authoritative value of that assessment would ebb and flow with every oscillation in diesel fuel's market value—we would operate for some months, perhaps even years, under the fiction that the two taxes are equivalent.[5] *Id.* ("Furthermore, there is no reason in principle why the railroads could not sue for such a judicial assessment *each year* (or for each tax bill) because the dynamic nature of any state's economy will alter the relative benefits and burdens of its tax system from moment to moment." (emphasis in original)). And if the price of diesel fuel causes rail carriers to bear a significantly larger tax burden than its competitors, at what point must we reverse course and hold that the sales tax is discriminatory? After one year of inequity? Three?[6] To adjust the comparison class makes little difference, and it behooves us to bear in mind the words of the Supreme Court:

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[5] The dissent also points out that under today's holding, "the sales and use taxes would discriminate against a rail carrier even if its competitors paid four times as much tax as the rail carrier for the same commodity." Dissenting Op. at 7–8. But if we were to adopt the dissent's approach and accept the State's justification for its discriminatory tax—that motor carriers pay some other commodity tax, that is sometimes equivalent—the reverse would also be true. That is to say, the sales and use tax exemption *would not* discriminate against a rail carrier even if its competitors paid four times *less* in tax as the rail carrier for the same commodity.

[6] This is to say nothing of the added value that the motor carriers receive from being able to accurately forecast their year-to-year tax burden by virtue of being subject to a fixed excise tax rather than a variable *ad valorem* tax.

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 589–90, 103 S. Ct. 1365, 1374 (1983) (footnote omitted).

We therefore decline to undertake the Sisyphean burden of evaluating the fairness of the State's overall tax structure in order to determine whether a single tax exemption causes a state's sales tax to be discriminatory. This case, then, becomes much simpler than it would appear at first blush. Rail carriers pay the State's sales tax—motor and water carriers do not. It is not a sufficient justification for the State to counter that its tax code will ultimately level the playing field.

Even if it were true that the exemptions at issue were not enacted to unfavorably target rail carriers, our decision would be the same because discrimination under § 11501(b)(4) "can be shown even if there is no direct evidence of targeting," as long as the tax imposes a proportionately heavier burden on rail carriers. *Koeller*, 653 F.3d at 510. Here, the rail carriers' main competitors have received favorable treatment: tax exemptions. In response, the State offers no "reasonable distinctions

between the favored and the disfavored"; therefore it has failed to carry the burden set forth by the Supreme Court in *CSX II*. *Id.* In *CSX II*, the Supreme Court queried the State: "Can you justify why motor and water carriers are taxed differently than rail carriers?" The State responds: "Motor and water carriers are taxed differently because they are taxed differently." But the Supreme Court demanded a justification from the State, not a Zen proverb. Section 11501(b)(4) does not allow us to sit idly by and take the State at its word that, in the long run, its tax code will burden CSX no more than its competitors. Moreover, no one can seriously dispute that the water carriers, who pay not a cent of tax on diesel fuel, are the beneficiaries of a discriminatory tax regime.

III. CONCLUSION

In short, after establishing a comparison class of competitors and showing that its competitors did not pay the sales tax on diesel fuel purchases, CSX made a prima facie showing of discrimination under § 11501(b)(4). The burden shifted to the State to provide a "sufficient justification" for the exemptions. It did not. We reverse the district court, hold that the State's sales tax violates the 4-R Act, and remand to the district court with instructions to enter declaratory and injunctive relief in favor of CSX consistent with this opinion.

REVERSED AND REMANDED.

COX, Circuit Judge, dissenting:

I dissent. Though I agree that the appropriate comparison class consists of the stipulated competitors, I do not agree that a tax exemption for interstate motor carriers discriminates against interstate rail carriers when motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity. As for the tax exemption for interstate water carriers, I conclude that the district court improperly placed the burden on CSX to provide evidence of the exemption's discriminatory effect. I would affirm the district court's ruling to the extent that it finds no violation of the 4-R Act with respect to the motor carriers' exemption but remand for reconsideration as to interstate water carriers.

The Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act) prohibits a state taxing authority from taking certain actions that place unfair burdens on railroads. The statute's first three subsections bar a state from making unfair assessments on railroad property, collecting a tax on such unfair assessments, and collecting an *ad valorem* property tax at a rate greater than that imposed on other "commercial and industrial property," 49 U.S.C. § 11501(b)(1)–(3).[1] At issue in

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[1] 1 Section 11501(b)(1)–(3) reads:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

this case is § 11501(b)(4), which prohibits a state and its subdivisions from "[i]mpos[ing] another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

We use a two-step inquiry to evaluate a claim of discrimination in violation of § 11501(b)(4). *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1109 n.8 (2011) (*CSX II*). The plaintiff railroad (CSX here) has the initial burden to establish a prima facie case of discriminatory tax treatment. If the plaintiff does so, the burden shifts to the defendant taxing authority (the State here) to establish that the differential tax treatment is justified and does not discriminate against the railroad. *Id.* ("Whether the railroad will prevail—that is, whether it can prove the alleged

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(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers."). If the defendant cannot meet its burden, the tax treatment violates § 11501(b)(4).

The parties in this case have agreed that CSX's competitors are interstate motor carriers ("on-highway motor carriers of property in interstate commerce") and interstate water carriers ("carriers of property in interstate commerce by ships, barges and other vessels"). (Dkt. 63 ¶ 10, at 3.) I proceed through the two-step analysis first with respect to motor carriers and then with respect to water carriers.

A. Motor Carriers

Like the majority, I have no doubt that CSX has established a prima facie § 11501(b)(4) violation by showing that the sales and use taxes apply to rail carriers but exempt motor carriers. (Op. at 11–12.) Where I disagree is in the second step of the analysis: whether the State has justified the differential treatment.

The State explains the exemption by pointing out that motor carriers must pay the 19¢ state excise tax per gallon of fuel they purchase. Rail carriers do not pay this tax. According to the State's argument, the fact that rail carriers are not subject to the excise tax justifies the differential treatment in the sales and use taxes, and the sales and use taxes do not discriminate against rail carriers.

The district court agreed with the State. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 892 F. Supp. 2d 1300, 1312–14 (N.D. Ala. 2012) (*CSX III*). The court compared the state sales and use taxes (measured in terms of what rail carriers paid per gallon of fuel, including the 4% tax) to the state motor-fuel excise tax (measured in terms of what motor carriers paid per gallon, including the 19¢-per-gallon tax) assessed from January 2007 to December 2009. *Id.* at 1313. The court found that "motor carriers actually pa[id] a higher" state tax. *Id.* Even adding to the comparison the additional sales and use taxes imposed on rail carriers by counties and cities in Alabama, motor carriers and rail carriers paid "substantially similar" taxes during the period in question. *Id.*[2] And that comparison failed to incorporate the motor-fuel excise taxes assessed by counties and cities on motor carriers, which ranged from 1¢ to 6¢ added to the state excise tax imposed on motor carriers. *Id.* In sum, the district court found, the taxes paid by rail carriers and motor carriers for fuel was "essentially the same." *Id.* Because its findings are not challenged on appeal, I accept them as accurate.

None of these findings are relevant, CSX argues,

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[2] I assume that sales and use taxes imposed by cities and counties are at issue in this case. Given that CSX named no city or county as a defendant, this assumption may not be true; I hesitate to agree that a city or county can be enjoined from imposing a tax when it has not been named as a party. But even if they can, my conclusion remains the same.

because the State cannot justify differential treatment by showing that the entities that are exempt from sales and use taxes are subjected to a separate tax not imposed on rail carriers. The majority agrees with CSX's position. It refuses to compare the two taxes, regardless of the numbers the taxing arrangement yields. (*See* Op. at 12.) But based on my reading of the Supreme Court's opinion in *CSX II* and case law in other circuits, I find this position both unsupported and contrary to Congress's intent.

CSX's argument and the majority opinion follow the approach taken by the Eighth Circuit in *Union Pacific Railroad Co. v. Minnesota Department of Revenue*, 507 F.3d 693 (8th Cir. 2007). There, the Eighth Circuit considered Minnesota's generally applicable sales tax on railroad fuel that exempted two primary competitors (motor carriers and air carriers) because they paid a separate excise tax, *see id.* at 694—a scenario nearly identical to the one confronting us here. Based on its earlier opinion in *Burlington Northern, Santa Fe Railway Co. v. Lohman*, 193 F.3d 984 (8th Cir. 1999), the Eighth Circuit refused to consider any other tax as a justification for the facial discrimination. *See Union Pac.*, 507 F.3d at 695 ("[W]e 'look only at the sales and use tax with respect to fuel to see if discrimination has occurred.'" (quoting *Lohman*, 193 F.3d at 986)).

But as the district court recognized, *see CSX III*, 892 F. Supp. 2d at 1310–11, the Eighth Circuit's

simplistic approach to evaluating challenges under § 11501(b)(4) incorrectly relies on distinguishable case law. *Lohman*, on which *Union Pacific* rests, refuses to consider other taxes as justification for facially discriminatory tax treatment. 193 F.3d at 986. The *Lohman* court relies on two cases for the proposition that the fairness of this tax scheme is "too difficult and expensive to evaluate," *id.*: the Fifth Circuit's opinion in *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987), and the Eighth Circuit's own opinion in *Trailer Train Co. v. State Tax Commission*, 929 F.2d 1300 (8th Cir. 1991).[3] But both *McNamara* and *Trailer Train* address a materially distinct fact pattern, and their analyses are unsuitable for this case.

In *McNamara* and *Trailer Train*, the court considered a different kind of tax—a specific tax that "targeted" railroads for differential treatment,[4] rather than a general tax that exempted railroads' competitors. In each case, the court decided that the appropriate comparison class consisted of *all commercial and industrial taxpayers*. In each case,

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[3] The majority opinion also applies *McNamara* and acknowledges *Trailer Train*. (*See* Op. at 12–14.)

[4] In *McNamara*, Louisiana imposed a tax on "public utilities," a relatively small group of taxpayers that included railroads. 817 F.2d at 374. Notably, "public utilities" also included certain motor and water carriers. *Id.* In *Trailer Train*, Missouri taxed an activity in which only railroads engaged. 929 F.2d at 1302.

the state argued that the tax did not discriminate against railroads because the state's tax structure, *as a whole*, treated railroads similarly to every other commercial and industrial taxpayer. And in each case, the court refused to entertain such a searching, time-consuming, expensive, and impracticable analysis. *See Trailer Train*, 929 F.2d at 1302–03; *McNamara*, 817 F.2d at 377–78.

Here, we have a much narrower issue. The appropriate comparison class includes the two stipulated competitors—a far more manageable class than one composed of all commercial and industrial taxpayers in Alabama. And in arguing that a single tax on motor carriers justifies their exemption from another tax, the State does not come close to proposing the massive endeavor that *Trailer Train* and *McNamara* refused to undertake. Like the district court, *see CSX III*, 892 F. Supp. 2d at 1310-11, I would distinguish *Trailer Train* and *McNamara* on that ground, and I would decline to follow *Lohman*'s and *Union Pacific*'s lead because they rely on those distinguishable cases.

That we must evaluate the State's justification, despite the Eighth Circuit's approach, is all the clearer after *CSX II*. There, the Court conceded that discrimination cases under the 4-R Act will often "raise knotty questions about whether and when dissimilar treatment is adequately justified." *CSX II*, 131 S. Ct. at 1114. But as the Court then insisted, "Congress has directed the federal courts to review a railroad's challenge[,] and . . . we would flout the

congressional command were we to declare the matter beyond us." *Id.*

Perhaps the most compelling reason to depart from the Eighth Circuit's approach is that, under that approach, we may reach the bizarre holding that a tax discriminates against a rail carrier even though the tax puts the rail carrier at no discernible disadvantage. The majority opinion reaches just that result, concluding that the sales and use taxes discriminate against rail carriers and in favor of motor carriers even though motor carriers pay "essentially the same" tax on their fuel. (*See* Op. at 12 (refusing to evaluate the comparison between the two taxes "even though in some years . . . the State's taxing arrangement might yield a fair result").) Under the majority's approach, the sales and use taxes would discriminate against a rail carrier even if its competitors paid four times as much tax as the rail carrier for the same commodity.

I cannot agree with that approach. Congress created the 4-R Act to stabilize railroads financially. *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 336, 114 S. Ct. 843, 846 (1994). This goal implies that an offending tax must disadvantage railroads; I fail to see how a tax that places rail carriers in the same tax position as their competitors—or a better one—could threaten railroads' financial stability. So it is clear to me that Congress enacted § 11501(b)(4) to eliminate tax schemes that impose a greater tax burden on railroads than other taxpayers. This purpose is explicit in the first three subsections of

§ 11501(b), each of which prohibits taxation methods that assess or tax rail carriers' property at a *higher rate* than other taxpayers. *See* § 11501(b)(1)–(3). By outlawing "another tax that discriminates" in the final subsection, Congress specifically targeted taxes that have a similar effect as those referred to in the previous three—placing a greater tax burden on railroads than other taxpayers for the same taxable item or event. In finding discrimination against rail carriers without determining whether rail carriers have actually been disadvantaged, the majority opinion flouts the language of the statute and Congress's clear intent.

Turning now to the State's justification, I agree with the district court that the State has met its burden to show that the tax exemption for motor carriers was not discriminatory against railroads.

As I explained above, a tax discriminates against railroads in violation of § 11501(b)(4) if the tax imposes a greater tax burden on railroads than it does on comparable taxpayers. The district court found that rail carriers paid *less* state tax on fuel than motor carriers during the period in question and that, even adding the local taxes imposed on rail carriers (and without adding local excise taxes paid by motor carriers), rail carriers and motor carriers paid "essentially the same" tax. *CSX III*, 892 F. Supp. 2d at 1313. These factual findings are not challenged on appeal. And I cannot conclude from these findings that railroads have been competitively disadvantaged in any way by the sales and use taxes'

exemptions for motor carriers.[5] I would hold that the State has met its burden to justify the differential treatment and, therefore, that the tax exemption does not discriminate against rail carriers within the

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[5] CSX contends that, even if rail carriers face the same tax burden as motor carriers in terms of purchasing and consuming fuel, rail carriers are still disadvantaged because they must maintain their own rights-of-way (tracks) while motor carriers' rights-of-way (highways) are maintained in part by the excise taxes they pay. CSX argues that the district court's refusal to consider these uneven operating expenses in its comparison to the two taxes, *see CSX III*, 892 F. Supp. 2d at 1314–15, was error because any analysis of relative tax burdens must include an analysis of the tangible benefits received or not received.

I disagree. True, railroads have to maintain their tracks. But that burden is not a *tax* burden that the 4-R Act prohibits, and no tax affects that burden. Say, for example, that the State eliminated both the motor-fuel excise tax and the motor-carrier exemptions in the sales and use taxes, leaving a system in which rail carriers and motor carriers paid identical 4% taxes on the purchase and use of their fuel. By CSX's logic, even that totally equal tax scheme would disadvantage railroads in violation of the 4-R Act because railroads have higher overhead expenses. Motor carriers still would not be responsible for maintaining the public highways of Alabama.

The difference in right-of-way maintenance costs has no place in the comparison of tax burdens. That railroads must pay for their own tracks is the inherent burden of operating a transportation network on private rights-of-way. In other words, it is a fundamental competitive disadvantage that railroads face. Congress did not intend the 4-R Act to eliminate *all* of railroads' competitive disadvantages, only those created by taxes. And here, the State has shown that the sales and use tax exemptions for motor carriers creates no tax disadvantage for railroads.

meaning of § 11501(b)(4).

B. Water Carriers

The district court held that the sales and use taxes' exemptions for water carriers did not discriminate against rail carriers in violation of the 4-R Act, in part because CSX "fail[ed] to meet it[s] evidentiary burden of proof." *CSX III*, 892 F. Supp. 2d at 1316. This conclusion is not entirely unreasonable; after all, the Supreme Court in *CSX II* did hint that the rail carrier must "prove the alleged discrimination" to prevail. *CSX II*, 131 S. Ct. at 1109 n.8 ("Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification . . . .").

But the district court required too much of CSX. The rail carrier bringing a § 11501(b)(4) claim can establish its prima facie case simply by showing that the tax in question exempts competitors. *See id.* at 1108 (noting that a state discriminates against one group of taxpayers by charging them a higher tax rate than another group). It then becomes the state's burden to show that the tax did not in fact discriminate against the railroad. *See id.* at 1109 n.8 ("[W]hether [the railroad] can prove the alleged discrimination[ ]depends on whether the State offers a sufficient justification . . . .").

In requiring more from CSX than a showing that the tax exempts water carriers, the district court

muddied the two-step inquiry and applied an incorrect legal standard. When a district court uses the wrong legal standard, we can remand for application of the appropriate standard. *See Kearse v. Sec'y, Fla. Dep't of Corr.*, 669 F.3d 1197, 1198 (11th Cir. 2011). Accordingly, I would remand this case so the district court can apply the correct standard (based on the existing record) and determine whether the State has offered sufficient justification for the tax exemption given to water carriers.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	)	
Plaintiff,	)	
vs.	)	**CASE NO. 2:08-cv-655-AKK**
ALABAMA DEPARTMENT OF REVENUE and JULIE P. MAGEE, Commissioner of the Alabama Department of Revenue,	)	
Defendant.	)	

MEMORANDUM OPINION

"Discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011). Here, on remand from the Supreme Court of the United States, *see id.*, this court is called upon to answer such a knotty question and must determine

whether, under the Railroad Revitalization and Regulatory Reform Act ("4-R Act"), 49 U.S.C. § 11501, the State of Alabama's "sales and use" tax constitutes "another tax that discriminates against a rail carrier." *See* doc. 1 ("Complaint"). The court finds no violation of the 4-R Act, and accordingly, will enter a separate order **DISMISSING** Plaintiff CSX Transportation, Inc.'s ("CSX") Complaint **with prejudice.**

I. PROCEDURAL HISTORY

CSX originally filed this action on April 14, 2008, "seeking to restrain and enjoin defendants . . . from assessing, levying, or collecting from plaintiff Alabama sales and use taxes on plaintiff's purchase or consumption of diesel fuel and gasoline used for rail transportation purposes in Alabama" because the "imposition of Alabama sales and use taxes on diesel fuel and gasoline purchased and used for rail transportation purposes is discriminatory and unlawful under Section 306 of the [4-R Act], Pub. L. No. 94-210, 90 Stat. 54 (February 5, 1976), now codified as 49 U.S.C. § 11501." Doc. 1, at 3. CSX's Complaint "also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that defendants' imposition of sales and use taxes on the purchase and consumption of diesel fuel and gasoline for rail transportation purposes in Alabama violated" the 4-R Act. *Id.* at 3-4. On July 8, 2008, Judge U.W. Clemon granted CSX's motion for a preliminary injunction and ordered CSX to "pay the disputed tax funds into an Escrow Fund, to be established at a

financial institution mutually agreed to by the parties, pending final resolution of this action." Doc. 14.

However, on July 23, 2008, the court stayed this action pending the outcome of the Eleventh Circuit's decision in *Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, NO. 08-12712-FF. *See* doc. 19. On December 16, 2008, the court dismissed this action, thereby dissolving the preliminary injunction, because the Eleventh Circuit held in *Norfolk Southern* that a tax *exemption* cannot constitute "another tax that discriminates against a rail carrier." Doc. 22 (citing *Norfolk S. Ry. Co. v. Ala. Dep't of Revenue,* 550 F.3d 1306, 1314-15 (11th Cir. 2008)). CSX appealed on January 29, 2009, doc. 23, but the Eleventh Circuit affirmed this court's dismissal under *Norfolk Southern* on September 3, 2009. Doc. 28 (*CSX Transp., Inc. v. Ala. Dep't of Revenue,* 350 F. App'x 318 (11th Cir. 2009)). CSX petitioned the Supreme Court of the United States for a writ of certiorari which the Court granted on June 14, 2010 to decide the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49U.S.C. § 11501(b)(4) as 'another tax that discriminates against a rail carrier.'" *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 130 S. Ct. 3409 (2010).

On February 22, 2011, Justice Kagan announced the opinion of the Court reversing the Eleventh

Circuit and holding that "CSX may challenge Alabama's sales and use taxes as 'tax[es] that 33addox33t33ate[e] against . . . rail carrier[s]' under § 11501(b)(4)." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1114 (2011) (alterations in original). The majority opinion, however, refused to address whether "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* As such, the Court remanded the merits question. *Id.* at 1107 n.5, 1114. The Eleventh Circuit, in turn, vacated its prior opinion, 350 F. App'x 318, and vacated this court's "December 18, 2008 order dissolving the preliminary injunction and dismissing CSXT's case," thereby remanding the case for further proceedings consistent with the Supreme Court's opinion. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 639 F.3d 1040 (11th Cir. 2011).

The undersigned received this remanded matter upon reassignment of the action on February 28, 2011, and, on March 10, 2011, restored the previously entered preliminary injunction, thereby enjoining Defendants from "assessing, levying, and/or collecting taxes on diesel fuel purchases and use by [CSX], pending a trial and determination on the merits of [CSX's] cause of action." Doc. 35. The court also required CSX to "pay the disputed tax funds into an Escrow Fund, to be established at a financial institution mutually agreed to by the parties, pending final resolution of this action." *Id.* On April 25, 2012, the court held a bench trial in this matter, *see* doc. 65, and also received pre- and post-

trial briefs by both parties, *see* docs. 61, 62, 67, 68, 69, 70.

II. FACTUAL BACKGROUND

The parties stipulated to many of the underlying facts in this matter.[1] CSX is a Virginia Corporation with its principal place of business located in Jacksonville, Florida. CSX is engaged in interstate commerce as a common carrier by railroad. The Alabama Department of Revenue ("Department") is the Department of the State of Alabama charged with the responsibility to administer and collect taxes within Alabama, including the administration of sales and use taxes. Defendant Julie P. Magee is the Commissioner of Revenue of the State of Alabama ("Commissioner") and is named in this action in her official capacity only. As Commissioner, Ms. Magee exercises general supervision over administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes.

Alabama imposes a sales tax on the gross receipts from the business of selling at retail or renting tangible personal property, or of furnishing entertainment. Alabama also imposes a use tax on the use or other consumption of property in the state. Railroads are subject to the sales and use taxes on either their purchase or consumption of diesel fuel

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[1]At trial, the court admitted as a joint exhibit the stipulated facts in ¶¶ 1-19 of Document 63. *See* doc. 65, at 13.

in the State of Alabama. The tax is imposed by the State at the rate of 4%. *See* Ala. Code §§ 40-23-2(1),[2] 40-23-61(a).[3] Moreover, under Alabama law, counties

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[2] "There is levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows:

(1) Upon every person, firm, or corporation, (including the State of Alabama and its Alcoholic Beverage Control Board in the sale of alcoholic beverages of all kinds, the University of Alabama, Auburn University, and all other institutions of higher learning in the state, whether the institutions be denominational, state, county, or municipal institutions, any association or other agency or instrumentality of the institutions) engaged or continuing within this state, in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debts or stocks, nor sales of material and supplies to any person for use in fulfilling a contract for the painting, repair, or reconditioning of vessels, barges, ships, other watercraft, and commercial fishing vessels of over five tons load displacement as registered with the U.S. Coast Guard and licensed by the State of Alabama Department of Conservation and Natural Resources), an amount equal to four percent of the gross proceeds of sales of the business except where a different amount is expressly provided herein . . . ." Ala. Code § 40-23-2.

[3] "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property, not including, however, materials and supplies bought for use in fulfilling a contract for the painting, repairing or reconditioning of vessels, barges, ships, other watercraft and commercial fishing vessels of over five tons load displacement as registered with the U.S. Coast Guard and licensed by the State of

and municipalities may impose sales and use taxes which correspond to and parallel the state's sales and use tax. The rates imposed by the counties and municipalities are in addition to the 4% rate imposed by the State of Alabama. The counties and municipalities are required by state statute to conform their rules, regulations, and procedures for the administration of sales and use taxes to the rules, regulations, and procedures adopted by the Department of Revenue. *See* Ala. Code §§ 11-3-11.2, 11-51-200 through 204; Ala. Code § 40-12-4. The following are the current sales and use tax rates imposed by cities and counties on CSX's purchase and use of diesel fuel: City of Birmingham – 4%, City of Mobile – 4%, City of Montgomery – 3.5%, County of Jefferson – 2%. County of Mobile – 1%, County of Shelby – 1%, County of Montgomery – 2.5%, County of Jackson – 2%, City of Bridgeport – 3%.

The Commissioner, acting through the Department, collects and administers sales and use taxes. The sales tax is collected by retailers, including operators of places of amusement, but is actually imposed on the consumer. *See* Ala. Code § 40-23-26I. CSX, however, holds a direct pay permit issued by the Department. Under a direct pay

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Alabama Department of Conservation and Natural Resources, purchased at retail on or after October 1, 1965, for storage, use or other consumption in this state at the rate of four percent of the sales price of such property or the amount of tax collected by the seller, whichever is greater . . . ." Ala. Code § 40-23-61(a).

permit, vendors of CSX do not collect the sales tax from CSX and then remit the taxes to the Department or local counties and municipalities; instead, CSX files sales and use tax returns and pays the taxes directly to the Department and to the local counties and municipalities.

The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property ("motor carriers") and carriers of property by ship, barge, and other vessel ("water carriers"). Air carriers are also engaged in the transportation of property in interstate commerce, but this mode of transportation only marginally competes due to the relatively small size and weight of the property transported in Alabama. Water carriers are exempt from sales and use taxes on their purchase or consumption of diesel fuel used for interstate or foreign commerce. *See* Ala. Code §§ 40-23-4(a)(10) (sales tax),[4] 40-23-62(12) (use tax).[5]

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[4] "There are exempted from the provisions of this division and from the computation of the amount of the tax levied, assessed, or payable under this division the following: . . . (10) The gross proceeds from the sale or sales of fuel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other watercraft (herein for purposes of this exemption being referred to as 'vessels') engaged in foreign or international commerce or in interstate commerce; provided, that nothing in this division shall be construed to exempt or exclude from the measure of the tax herein levied the gross proceeds of sale or sales of material and supplies to any person for use in fulfilling a contract for the painting, repair, or

Additionally, motor carriers are not subject to sales and use taxes on their purchase or consumption of petroleum products used for on-road transportation purposes; rather, interstate motor companies pay a Motor Fuels Excise Tax totaling 19¢ per gallon for on-road diesel fuel. *See* Ala. Code §§ 40-17-2(1),[6] 40-

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reconditioning of vessels, barges, ships, other watercraft, and commercial fishing vessels of over five tons load displacement as registered with the U.S. Coast Guard and licensed by the State of Alabama Department of Conservation and Natural Resources." Ala. Code § 40-23-4(a)(10).

[5] "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article: . . . "(12) Fuel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other watercraft (herein for purposes of this exemption being referred to as vessels) engaged in foreign or international commerce or in interstate commerce; provided, that nothing in this article shall be construed to exempt or exclude from the measure of the tax herein levied the gross proceeds of sale or sales of material and supplies to any person for use in fulfilling a contract for the painting, repair or reconditioning of vessels, barges, ships, other watercraft and commercial fishing vessels of over five tons load displacement as registered with the U.S. Coast Guard and licensed by the State of Alabama Department of Conservation and Natural Resources . . . ." Ala. Code § 40-23-62(12).

[6] "There is hereby levied an excise tax on motor fuel of $.13 per gallon, which shall be collected as herein provided.

(1) Every distributor or supplier shall collect and pay over to the state Department of Revenue an excise tax of $.13 per gallon upon the receipt, by any means other than a transfer by a marine vessel or pipeline, of motor fuel from a terminal, refinery, barge, barge line, or pipeline terminal in this state, or

17-220(e).[7] According to the Freight Analysis Framework, an analysis of freight movement published by the United States Department of Transportation, in the year 2002, 82% of freight moved intrastate within Alabama was transported by trucks, 6% by rail, and 1% by water.

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upon import into this state by any means other than pipeline, marine vessel, or the fuel supply tank of the vehicle, for any use of motor fuel not exempted by this article. Provided, that where any excise tax imposed by this section shall have been paid to the state by a distributor or supplier the payment shall be sufficient, the intent being that the tax shall be paid to the state but once; provided, further, that motor fuel subject to the excise tax levied by this article shall not be subject to any other excise tax levied by the state. Motor fuel that is indelibly dyed and chemically marked in accordance with regulations issued by the Secretary of the Treasury of the United States under 26 U.S.C. § 4082 shall be exempt from the tax imposed by this section." Ala. Code § 40-17-2, *repealed by* Act 2011-565, p. 1084, § 45, effective October 1, 2012.

[7] "Every distributor or supplier shall collect and pay over to the state Department of Revenue an excise tax of $.06 per gallon upon the receipt, by any means other than a transfer by a marine vessel or pipeline, of motor fuel from a terminal, refinery, barge, barge line, or pipeline terminal in this state, or upon import into this state by any means other than pipeline, marine vessel, or the fuel supply tank of the vehicle, for any use of motor fuel not exempted by this article. Provided, that where any excise tax imposed by this section shall have been paid to the state by a distributor or supplier the payment shall be sufficient, the intent being that the tax shall be paid to the state but once. Motor fuel that is indelibly dyed and chemically marked in accordance with regulations issued by the Secretary of the Treasury of the United States under 26 U.S.C. § 4082 shall be exempt from the tax imposed by this subsection." Ala. Code § 40-17- 220(e).

As it relates to the disbursement of the 19¢ per gallon Motor Fuels Excise Tax, *see* Ala. Code §§ 40-17-2(1), 40-17-220(e), the proceeds of 13¢ per gallon are distributed to the Alabama Department of Transportation for the construction, repair, maintenance, and operation of public roads and bridges, and payment of principal and interest on highway bonds. Ala. Code § 40-17-13. The proceeds from the 6¢ per gallon tax are distributed as follows: (a) 4.69% to counties for construction and maintenance of roads and bridges, (b) 0.93% to towns and cities for construction and maintenance of roads and bridges, and (c) the remainder to the Alabama Department of Transportation for highway use. Ala. Code § 40-17- 222.

Finally, the parties provide in the stipulated facts that CSX is a "common carrier by railroad" within the meaning of Section 306(1)(d) of the 4-R Act. 49 U.S.C. § 11501. Moreover, for the tax years 2006 through 2010, CSX paid the following amounts of property taxes to cities and counties in Alabama on its track structure: 2006 - $423,860.00; 2007 - $436,840.00; 2008 - $442,307.00; 2009 - $430,578.00; 2010 - $454.079.00.

The court held a bench trial on April 25, 2012 to resolve any remaining factual disputes. At trial, the court heard testimony from Vickie J. Friedman, CSX's director of sales and use taxes; Dr. Richard R. Mudge, CSX's expert; Derrick Stephen DuBose, the Department's manager of the motor fuels section; Jay Starling, the Department's assistant director of

the motor vehicle division; and Joe Walls, the Department's director of the sales tax division. *See* doc. 65.

III. ANALYSIS

Congress passed the 4-R Act to "'restore the financial stability of the railway system of the United States,' among other purposes. § 101(a), 90 Stat. 33. To help achieve this goal, Congress targeted state and local taxation schemes that discriminate against rail carriers." *CSX Transp.*, 131 S. Ct. at 1105. Accordingly, the 4-R Act establishes that "[t]he following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to

> commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part."

49 U.S.C. § 11501(b).[8] Moreover, the Eleventh Circuit instructs that subsection (b)(4) is a catchall provision intended to "prevent discriminatory taxation of a railroad carrier by any means," not simply real property-based taxation. *Ala. Great. S. R.R. Co. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981); *see also Kan. City S. Ry. V. McNamara*, 817 F.2d 368, 371-74 (5th Cir. 1987). Thus, while the legislative history predominately concerned discriminatory property taxes, Congress "realized near the end that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation. Congress therefore added § 1150[1](b)(4) to ensure that the statute would not fail of its broader purpose." *McNamara*, 817 F.2d at 373.

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[8] "This provision was originally codified at 49 U.S.C. § 26c (1976 ed.). In 1978, Congress recodified it at § 11503 (1976 ed., Supp. II), with slightly altered language but 'without substantive change,' §3(a), 92 Stat. 1466. In 1995, Congress again recodified the section without substantive change, this time to 49 U.S.C. § 11501. This opinion refers to the statute's current text." *CSX Transp.*, 131 S. Ct. at 1105 n.1. The court also notes that the 4-R Act specifically empowers federal district courts to grant such injunctive relief and declaratory judgment as may be necessary to prevent, restrain, and terminate any violations of the Act. *See* 49 U.S.C. 11501(c).

See also CSX Transp., 131 S. Ct. at 1107 ("'[A]nother tax,' as used in subsection (b)(4), is best understood to refer to all of these—more precisely, to encompass any form of tax a State might impose, on any asset or transaction, except the taxes on property previously addressed in subsections (b)(1)-(3)."). Conversely though, "the purpose of the 4-R Act was *not* to grant railroads preferential treatment . . . . Rather, in adopting the 4-R Act, Congress' purpose was to remedy discrimination against the railroads and place them on an even playing field with other state taxpayers." *Atchison, Topeka, and Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 442 (9th Cir. 1996) (emphasis added). Thus, any state "taxation scheme" runs afoul of the 4-R Act if it "discriminates against a rail carrier," and in this context, the Court determined that "'[d]iscrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *CSX Transp.*, 131 S. Ct. at 1108 (quoting Black's Law Dictionary 534 (9th ed. 2009)).

Furthermore, under this logic, the Court found that the motor carrier and water carrier *exemptions* to Alabama's generally applicable sales and use tax *could* violate the 4-R Act's prohibition on discriminatory taxation. Thus, the Court instructed that "[w]e hold only that § 11501(b)(4) enables a railroad to challenge an excise or other non-property tax as discriminatory on the basis of the tax scheme's exemptions . . . . Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers

a sufficient justification for declining to provide the exemption at issue to rail carriers." *Id.* at 1109 n.8.

A. Burden of Proof

Before addressing the merits question, the court finds it necessary to establish the proper burden of proof under the 4-R Act's prohibitions. The 4-R Act's language only provides in relevant part that [t]he burden of proof in determining assessed value and true market value is governed by State law." 49 U.S.C. § 11501I. However, the terms "assessed value" and "true market value" are only found in the 4-R Act's prohibitions against discriminatory property taxes, not the catchall provision at issue here. *See id.* at § 11501(b)(1)-(4). Furthermore, while maintaining that a state may justify a seemingly discriminatory tax, the Supreme Court implied that the burden of proof still rests with the plaintiff railroad. *See* 131 S. Ct. at 1109 n.8 ("[w]hether the railroad will prevail—that is, whether it can prove the alleged discrimination . . . ."). Accordingly, as the parties offer no other indication, the court adopts the burden of proof announced by the Eighth Circuit in *Burlington N. R. Co. v. James*, 911 F.2d 1297, 1300 (8th Cir. 1990), that, "[i]n order to succeed on the merits, a plaintiff railroad must prove the discriminatory effects of the tax by a preponderance of the evidence."

B. The Comparison Class

Naturally, any discussion regarding "discrimination" requires some form of comparison

class. Put simply, to determine whether an entity is "favored," there must exist a "disfavored" separate and distinct entity. *See Union Pac. R.R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) ("[A] court must first determine the class of taxpayers with whom the railroads are to be compared."). Here, it appears both parties agree that rail carriers' "competing transportation modes" constitute the proper comparison under the 4-R Act. *See* doc. 68, at 14; doc. 67, at 2; doc. 69, at 2. More specifically, the pertinent issue is whether Alabama's sales and use taxes on diesel fuel discriminate against rail carriers as compared to motor carriers and water carriers based on certain exemptions for these competing transportation modes. *Id.* And indeed, many courts addressing similar tax schemes agree that the "competing mode" comparison is appropriate. *See Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984 (8th Cir. 1999) (establishing that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," and where "railroad companies are subject to [] generally imposed [sales and use taxes], while their direct competitors are not," the proper comparison class "is the competitive mode"); *Union Pacific*, 507 F.3d at 695 (holding that, under *Lohman*, the "'competitive mode' comparison class, which is comprised of the railroads' direct competitors, was the proper comparison class for ascertaining whether Missouri's sales and use tax scheme violated § 11501(b)(4)"); *Kan. City S. Ry. Co. v. Bridges*, No. 04-2547, 2007 WL 977552 (W.D. La. March 30, 2007) (same).

C. Lohman and *McNamara*

CSX relies heavily on the Eighth Circuit's decision in *Lohman* and its progeny to establish the discriminatory nature of Alabama's sales and use taxes. *See generally* docs. 61, 68. In *Lohman* the plaintiff railroad company challenged Missouri's 4.225% generally applicable sales and use taxes under the 4-R Act, 49 U.S.C. § 11501(b)(4), because the taxes exempted the railroad's major competitors—trucks and barges. 193 F.2d at 985. Under the Missouri scheme, however, trucks paid a fuel excise tax of seventeen cents per gallon, but "[b]arge lines apparently pay no similar taxes of any kind." *Id.* After determining that the railroad's primary competitors served as the proper comparison class, the court agreed with the railroad that "only the sales and use taxes should be taken into account to determine if those sales and use taxes are discriminatory." *Id.* at 986. Therefore, the court reasoned that "a state's overall tax structure need not be examined under the 4-R Act even if fair taxing arrangements exist, such as taxing one business with property taxes and another with sales taxes, '"because the actual fairness of those arrangements is too difficult and expensive to evaluate."'" *Id.* (quoting *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1303 (8th Cir. 1991) (quoting *McNamara*, 817 F.2d at 375)). As such, the court concluded that, "[w]ithin the competitive mode class, only railroads pay the tax. Barges and truck are exempt. Accordingly, we hold that Missouri's sales and use tax on fuel violates the 4-R Act." *Id.*

The Eighth Circuit reaffirmed *Lohman* eight years later in *Pacific Union*. In that case, the plaintiff railroad challenged Minnesota's 6.5% sales and use tax imposed on the railroad's purchase or consumption of transportation fuel. 507 F.3d at 694. While two of the railroad's competitors—barges and Great Lakes ships—also paid this tax, the Minnesota tax scheme exempted motor carriers and air carriers "because they pay an excise tax on their transportation fuel purchases." *Id.* The district court found that "'because railroads are subject to the exact same tax as at least two of their competitors, and because all competitors within the comparison class are subject to a tax on fuel,'" there is no discrimination against railroads. *Id.* The Eighth Circuit disagreed and held that *Lohman* "precluded the district court from considering the excise tax the motor carriers and airlines pay on fuel in making its determination." *Id.* at 695. Accordingly, the district court "should have confined its analysis to only the sales and use taxes on transportation fuel." *Id.*

Furthermore, the United States District Court for the Western District of Louisiana adopted the *Lohman* analysis in *Bridges*, 2007 WL 977552. The court in *Bridges* addressed a similar Louisiana tax scheme as that imposed in Alabama. Louisiana imposed a 4% sales and use tax on the plaintiff rail carrier's diesel fuel, but exempted motor carriers from this tax "if the transportation fuel is subject to the Louisiana fuel excise tax . . . . On-road diesel fuel, including diesel fuel used as transportation fuel by motor carriers, is subject to an excise tax of $.20

per gallon." *Id.* at *2. Louisiana also exempted water carriers engaged in "foreign or interstate commerce" from the 4% sales and use taxes, but the sales and use taxes applied to water carriers involved solely in intrastate commerce. *Id.* The court found that Louisiana's sales and use taxes violated the 4-R Act by discriminating against rail carriers, and citing *McNamara* and *Lohman*, refused to consider "the impact of alternative taxes, such as the excise tax, when assessing the discriminatory impact of sales and use taxes on rail carriers." *Id.* at *6.

In other words, the *Bridges* court declined to ascertain the "equivalency" of the excise tax to the sales and use taxes. *Id.* at *7. Accordingly, the court again cited *McNamara* for the proposition that "'our conclusion is somewhat formalistic. But the 4-R Act is formalistic. And again, we have faith in the abilities of the state tax collectors to reach the pockets of the railroads with taxes that are actually and formally fair.'" *Id.* at *6 (quoting *McNamara*, 817 F.2d at 379). To further support its holding, the *Bridges* court maintained that "'[c]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.'" *Id.* at *7 (quoting *Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. 575, 589-90, 103 S. Ct. 1365, 1374, 75 L.Ed.2d 295 (1983) (footnote omitted)). Therefore, when comparing motor carriers with rail

carriers, the court concluded, "[t]he diesel fuel used by motor carriers is subject to an excise tax and is therefore exempt from the imposition of the Louisiana sales and use tax. Since the excise tax is not under consideration in the instant evaluation, the Court finds that motor carriers are treated more favorably than rail carriers under the Louisiana sales and use tax structure." *Id.* at *8 (citations omitted).

Finally, the court finds it necessary to discuss the Fifth Circuit's opinion in *McNamara*—the case upon which *Lohman*, *Pacific Union*, and *Bridges* substantially rest. In *McNamara* the court considered a 2% tax that Louisiana imposed on the gross receipts of all "public utilities," including "railroads and railways, sleep cars, motor bus lines, motor freight lines, express companies, telephone companies, telegraph companies, boat or packet lines, and pipe lines." 817 F.2d at 370. The court found that this tax discriminated against rail carriers but utilized the comparison class of all "other commercial and industrial taxpayers." *Id.* at 375. Based on this comparison class, *and explicitly rejecting the comparative modes of transportation class*, the court admitted that the 4-R Act "puts severe limits on the broad discretion usually afforded state taxing authorities . . . . [because] [o]ur holding may preclude the state from putting the railroads into one of these smaller tax classes even if that classification is perfectly fair." *Id.* at 375. Furthermore, the court held that, when comparing taxes on rail carriers with taxes on "other

commercial and industrial taxpayers," the 4-R Act "forbids some fair arrangements because the actual fairness of those arrangements is too difficult and expensive to evaluate." *Id.* And indeed, as it relates to "other commercial and industrial taxpayers," the court refused to consider "the overall tax burden of the railroads and to compare that burden with all other commercial and industrial taxpayers." *Id.* at 377. To do so demands "[d]etermining the intrinsic economic fairness of a tax system to a particular taxpayer[,] [] a paradigm of the kind of polycentric problem for which courts are ill-suited." *Id.*

Conversely, when discussing "complimentary" taxes allegedly *not* imposed on railroads, the court stated "[i]t may be that in an appropriate case we would allow a state to save a facially discriminatory tax by showing that it is *necessary* to 'compensate' for some state or local tax—a tax applicable to 'other commercial and industrial' taxpayers—that for some reason *cannot* be levied against the railroads." *Id.* at 376 (emphasis in original). However, the facts presented to the court revealed that the secretary of the department of revenue was actually suing the plaintiff railroad company for underpayment of this purported complimentary tax. *Id.*

To conclude, this courts notes a significant fallacy with the *Lohman* cases' reliance on *McNamara* for the proposition that courts should refuse to analyze a state's entire tax scheme. *See Lohman*, 193 F.3d at 986; *Union Pacific*, 507 F.3d at 695-96; *Bridges*, 2007 WL 977552, at *6-8. In *McNamara*, the Fifth Circuit

found that "other commercial and industrial taxpayers," *not* the competitive modes, constitute the proper comparison class. 817 F.2d at 375. As such, the Fifth Circuit found that evaluating the entire cumulative nature and effect of a state's tax scheme on *this* large comparison class would impose substantial theoretical and practical difficulties on a court. However, the *Lohman* cases adopted a much smaller comparison class for purposes of ascertaining whether a state's tax scheme discriminates against rail carriers—the competitive mode class. *See Lohman*, 193 F.3d at 984; *Union Pacific*, 507 F.3d at 695; *Bridges*, 2007 WL 977552, at *7. Thus, the use of *McNamara* to support a purported inability to perform the comparison task seems strained when the comparison class is drastically reduced. This court, therefore, refuses to blindly adopt the conclusion in *McNamara* since the parties here agree on a different class for comparison purposes—the competitive mode class, not the "all other commercial and industrial taxpayers" class.

D. The Supreme Court's Decision

As previously stated, in *CSX Transportation*, the Court found that Alabama's sales and use taxes constitutes "another tax" for purposes of the 4-R Act, and, as such, CSX may raise a § 11501(b)(4) challenge to the various exemptions that Alabama's tax scheme grants. 131 S. Ct. at 1114. This much is uncontroversial. However, for purposes here, the Court also offered numerous indications regarding *how* a district court should approach the merits

based determination—or, whether the tax scheme, in fact, discriminates against rail carriers. Implicit in the Court's holding that exemptions for competitors may create discriminatory treatment is the understanding that the district court must undertake a thorough examination of the exemption at issue. More specifically, "[w]hat the complaint protests is Alabama's imposition of taxes on the fuel CSX uses; what the complaint requests is that Alabama cease to collect those taxes from CSX. *The exemptions, no doubt, play a central role in CSX's argument: They demonstrate, in CSX's view, that the State's sales and use taxes discriminate against railroads.* But the essential subject of the complaint remains the taxes Alabama levies on CSX." *Id.* at 1108 (emphasis added, internal citations omitted). Thus, the Court maintained that "[t]o charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter. That discrimination continues (indeed, it increases) if the State takes the favored group's rate down to 0%. And that is all an exemption is." *Id.* (emphasis added). Again, the Court's language necessitates reviewing the relative position of both groups—those purportedly favored and those purportedly unfavored—in order to properly assess a claim of discrimination.[9]

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[9] CSX also cites *Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141, 149-50 (1979), for the proposition that this court may not analyze a "state's total tax structure to determine whether the state in fact" discriminates against rail carriers. Doc. 68, at 15-

Put differently, the Court found that an allegation of discrimination under the 4-R Act inherently allows the party charged with discrimination to justify its differential treatment. Thus, where a tax applicable to rail carriers contains exemptions, "[t]o say that such a tax . . . does not 'discriminate'—assuming the groups are similarly situated and there is no justification for the difference in treatment—is to

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16. The court disagrees with CSX's purported analogy to *Snead*. In *Snead*, the Court rejected a New Mexico tax "on the privilege of generating electricity within its borders" under the Tax Reform Act of 1976. 441 U.S. at 146 (citing 15 U.S.C. § 391). This federal law prohibited states from "assess[ing] a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." *Id.* The Court refused to examine New Mexico's entire tax structure to ascertain whether a greater tax burden is imposed on electricity sent out of the state because "the federal statutory provision is direct[ed] specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." *Id.* at 149. Thus, the Court only considered taxes on the generation of electricity and not gross receipts taxes. *Id.* Conversely, here, the 4-R Act provision at issue prohibits "another tax that discriminates against a rail carrier." 49 U.S.C. § 11501(b)(4). This language contains no similar restrictions as seen in *Snead*, and as a result, opens the door to considering any and all taxes that potentially discriminate against rail carriers. Put differently, *Snead* requires district courts to "look narrowly at the type of tax the federal statute names." 441 U.S. at 149-50. Here, the type of tax the federal statute names is "another tax," and "another tax" "as used in subsection (b)(4), is best understood to refer to all of these—more precisely, to encompass any form of tax a State might impose, on any asset or transaction . . . ." *CSX Transp.*, 131 S. Ct. at 1107.

adopt a definition of the term ['discriminate'] at odds with its natural meaning." *Id.* at 1109; *see also id.* at 1109 n.8 ("Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers."). And indeed, the Court acknowledged that "inquiry into discrimination may pose difficulties . . . . Discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified." *Id.* at 1114. However, "Congress has directed the federal courts to review a railroad's challenge; and in either case, we would flout the congressional command were we to declare the matter beyond us." *Id.*

In sum, the *CSX Transportation* language seemingly rejects the *Lohman* directive for district courts to avoid considering the extent and purpose of an exemption not available to rail carriers, but available to comparative modes of transportation, because such exercise "is too difficult and expensive to evaluate." *Lohman*, 193 F.3d at 986 (citations and quotation marks omitted). Accordingly, this court must ascertain whether the state adequately justifies the sales and use tax exemptions for rail carrier's principal competitors. And indeed, to adequately answer that question, this court, unlike the *Lohman* cases, finds it necessary to analyze rail carriers' competitors in "all relevant respects."

E. Discrimination under the 4-R Act

CSX contends that certain exemptions from Alabama's sales and use tax scheme granted to motor carriers and interstate / foreign water carriers, but not rail carriers, constitute discrimination against rail carriers. The court will address each competitor in turn.

i. Motor Carriers

Alabama's tax scheme requires CSX to pay a 4% tax on its purchase or consumption of diesel fuel within the state. *See* Ala. Code §§ 40-23-2(1), 40-23-61(a). While this sales and use tax scheme generally applies to all consumers, the tax scheme exempts purchasers of non-dyed diesel motor fuel, or the fuel used by motor carriers. *See* Ala. Code §§ 40-17-2, 40-17-220(e). The code sections exempting motor carriers from the sales and use taxes impose a 19¢ per gallon excise tax on the diesel fuel purchased by motor carriers. *Id.* ("[M]otor fuel subject to the excise tax levied by this article shall not be subject to any other excise tax levied by the state."). The motor fuels excise tax explicitly exempts users of dyed diesel, the fuel used by rail carriers. *Id.* ("Motor fuel that is indelibly dyed and chemically marked in accordance with regulations issued by the Secretary of the Treasury of the United States under 26 U.S.C. § 4082 shall be exempt from the tax imposed by this section."). Accordingly, to justify the sales and use tax "exemption" provided to motor carriers, but not rail carriers, *see CSX Transp.*, 131 S. Ct. at 1109 n.8, the Department cites the language of the actual exemption that imposes a separate tax on the fuel

used by motor carriers. *See* doc. 67, at 4-6. The court finds this justification sufficient under the 4-R Act because the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same.

Indeed, when comparing the tax rate imposed on diesel fuel by *Alabama*'s 4% sales and use taxes (rail carriers) and *Alabama*'s 19¢ per gallon excise tax (motor carriers), the motor carriers actually pay a higher rate. *See* doc. 65, at 83-85; Def. Trial Exh. 1 ("Comparison of State Sales Taxes Paid on Dyed Diesel Fuel to State Motor Fuels Tax on Undyed Diesel Fuel"). The evidence demonstrates that from January 26, 2007 through December 25, 2009, motor carriers paid more per gallon of diesel fuel (average price per gallon + 19¢ per gallon) than rail carriers (average price per gallon + 4% sales tax per gallon). *Id. See also CSX Transp.*, 131 S. Ct. at 1108.

Moreover, even when factoring the local (city and county) sales and use taxes imposed on rail carriers's diesel fuel,[10] rail carriers and motor carriers paid

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[10] The Department argues against this analysis because "the Department does not act in concert with nor does it administer, collect, monitor, enforce or provide legal services for the localities where CSX[] pay sales and/or use taxes." Doc. 67, at 7 n.1. The court disagrees because the 4-R Act specifically prohibits "a State, subdivision of a State, or authority acting for a State or subdivision of a State" from imposing discriminatory taxes, 49 U.S.C. § 11501(b), and Alabama's tax scheme explicitly authorizes these localities to impose sales taxes that parallel state sales taxes except the provisions relating to the

similar rates per gallon of diesel fuel from January 2007 through December 2009. In fact, based on CSX's evidence produced at trial, when adding the average local sales tax to the price per gallon of rail carriers' diesel fuel (in addition to the state tax), rail carriers paid more per gallon of diesel fuel than motor carriers in November 2007 through November 2008 and November 2009 through December 2009, but motor carriers paid more per gallon in January 2007 through October 2007 and December 2008 through October 2009. Doc. 65, at 29; Pla. Trial Exh. 1. And indeed, these calculations fail to account for the local excise taxes imposed on motor carriers per gallon purchased of undyed diesel fuel. Doc. 65, at 30-31; *id.* at 60 (testimony from Steve DuBose, manager of the Department's motor fuels section, that local taxes on clear diesel fuel range from one (1) to six (6) cents per gallon). Thus, the Department's justification for the exemption survives scrutiny—motor carriers receive an exemption from paying Alabama's sales and use taxes on diesel fuel *because* they pay a comparable excise tax on this fuel, a tax not imposed on rail carriers. The two competitors pay a substantially similar tax rate on diesel fuel and, accordingly, neither transportation mode is unjustifiably favored. In sum, the court acknowledges that the tax rate paid on diesel fuel by rail carriers and motor carriers is not precisely the same; however, as the rates are substantially

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tax rate. Ala. Code §§ 11-3-11.2, 11-51-200 through 204, 40-12-4.

similar, the court finds any differences sufficiently justified, and, most importantly, the court finds that these differences offer no favoritism to motor carriers as opposed to rail carriers. As such, CSX failed to meet its burden of proof that it suffered from discrimination. *See Burlington N.*, 911 F.2d at 1300.

Furthermore, while the court finds it necessary to consider the tax rate per gallon of diesel fuel paid by rail carriers compared with motor carriers, the court declines CSX's invitation to also consider how the state of Alabama spends its tax revenue. CSX contends that the excise tax imposed on motor carriers "results in an important tangible benefit to the motor carriers in the form of a network of well-maintained roads and bridges . . . while railroads receive no such benefit from the tax they pay since they must build, maintain, and pay taxes on their rail network from their own resources." Doc. 68, at 18. Accordingly, CSX concludes, the excise tax "provides a distinct competitive advantage for the trucking industry relative to its largest competitor, i.e., the railroads." *Id.* (citing doc. 65, at 41-42 (trial testimony of Dr. Richard R. Mudge)). However, CSX's contention misses the mark because it pertains to discretionary spending by a state—not a discriminatory tax as prohibited by the 4-R Act. Moreover, the comparison is inapt because CSX's rail network is a private network and is restricted from the general public. In contrast, motor carriers use public roads. As such, any benefit the motor carriers receive from the well maintained roads is due simply to the fact that the state must maintain the roads for

the general public. In other words, absent evidence that the state uses the fuel tax motor carriers pay to maintain private restricted access roads used exclusively by motor carriers, CSX's example misses the mark. In fact, at trial, the Department provided that motor carriers' fuel used for "off road" or non-public road purposes is taxed the same as CSX's fuel. Doc. 65, at 29-30; *see also* Ala. Code § 40-17-2(3). Like CSX, these motor carriers are responsible for maintaining their own private infrastructure. Thus, when the comparison is made to motor carriers that are actually similarly situated to CSX in all respects, CSX's contentions fall flat.

Furthermore, the 4-R Act's first three prohibitions pertain to the assessment and value of rail transportation property and the property tax rates applied to this property; however, the Act provides no limitation or instruction for a state or locality's spending of the property tax revenues. *See generally* 49 U.S.C. § 11501. As such, the court refuses to read into subsection (b)(4) any directive regarding a state's spending of revenue from "another tax" that it collects from rail carriers, assuming the tax is collected through non-discriminatory means. Even though the proceeds from the motor fuel excise tax are directed to the Alabama Department of Transportation and localities for the construction, repair, maintenance, and operation of public roads and bridges—as opposed to the state's education and general funds for the sales and use taxes, *see* Ala. Code §§ 40-23-35, 40-23-85; doc. 65, at 87—both motor carriers and rail

carriers maintain comparable tax rate burdens on the diesel fuel purchased.

To find differently under the 4-R Act would grant rail carriers unparalleled control over state spending, a result certainly not intended by Congress. State and local governments spend public money, or tax revenue, for public purposes such as maintenance and construction of public roads and bridges. *See Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 514 (1937) ("[S]ince the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes."). Conversely, absent express instruction otherwise, it violates Alabama state law for the state to spend public money to aid private enterprise. *See* Ala. Const. Art. IV, § 93 ("The state shall not . . . be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation, except as may be expressly authorized by the Constitution of Alabama, or amendments thereto."). Accordingly, CSX's interpretation of the 4-R Act places the state in an untenable dilemma—either amend Alabama law to allow the spending of public money on private railway maintenance, or, stop distributing tax revenue to places of public accommodation such as roads and bridges because this distribution arguably benefits rail carrier's competitors more than rail carriers. And, moreover, CSX could still claim discrimination under this theory if the state imposed a single 19¢ per gallon excise tax on all diesel fuel

but spent more of the revenue on public roads as opposed to private tracks. The court refuses to impose this choice on the state and finds no basis in the 4-R Act for doing so; rather, the court limits its analysis to the tax rates imposed on the purchase and consumption of diesel fuel between rail carriers and motor carriers.

Similarly, the court finds it unnecessary to analyze the sales and property tax burden CSX suffers for track infrastructure maintenance, repair, and operation. *See* doc. 68, at 18. At trial, Vickie J. Friedman, CSX's director of sales and use taxes, testified that a proper "burdens" analysis requires consideration of "a property tax on [CSX's] infrastructure and then as well as a sales tax on the parts and material that go into building that infrastructure" because rail carriers must pay to maintain their own infrastructure, a cost not incurred by motor carriers. Doc. 65, at 22. Again, however, the 4-R Act concerns applicable tax rates, not the gross revenue generated against rail carriers as opposed to the competing modes of transportation. *See* 49 U.S.C. 11501(b). Accordingly, the fact that CSX spends more money on track maintenance or owns more real property than motor carriers, and, as such, pays a greater sum to the Department in taxes for these purposes, is not relevant to whether Alabama imposes a discriminatory tax on rail carriers. Put simply, as rail carriers and motor carriers both pay precisely the same sales and use tax rate on raw materials and the same property tax

rate,[11] doc. 65, at 81, the court finds no evidence of discrimination or favorable treatment. *See* 49 U.S.C. § 11501(b); *CSX Transp.*, 131 S. Ct. at 1108.

ii. Interstate / Foreign Water Carriers

Alabama's sales and use taxes also exempt "the gross proceeds from the sale or sales of fuel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other watercraft . . . engaged in foreign or international commerce or in interstate commerce," Ala. Code § 40-23-4(a)(10), and the "storage, use or other consumption in this state of . . . [f]uel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other watercraft . . . engaged in foreign or international or in interstate commerce." Ala. Code § 40-23-62(12). *See, e.g.*, *Bean Dredging, L.L.C. v. Ala. Dep't of Revenue*, 855 So. 2d 513, 519 (Ala. 2003) (holding that company hired to dredge Mobile Bay and Mobile River engaged in "interstate commerce" and therefore should receive an exemption from Alabama's sales tax for its fuel and supplies). CSX contends that this exemption for interstate water carriers, a principle competitor, also evidences "another tax that discriminates against a rail

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[11] And indeed, if CSX paid a higher property tax rate, the court assumes that CSX's suit would include claims under 49 U.S.C. § 11501(b)(1)-(3).

carrier" because "interstate water carriers pay neither a motor fuel excise tax nor sales tax on their diesel fuel." *See* doc. 70, at 6. The parties agree, however, that water carriers involved solely in intrastate transportation are subject to the same sales and use taxes as rail carriers. *See* doc. 63, at 4. *Cf. Ala. Dep't of Revenue v. Midstream Fuel Serv., Inc.*, 521 So. 2d 75 (Ala. Civ. App. 1988) (establishing that this exemption for interstate commerce constitutes a "full exemption," and once the requirements of the exemption are met, the water carrier "is not subject to an apportion[ed] [tax] for use of the Alabama inland waterways during a part of that [interstate] trip or voyage").[12]

The court finds that CSX cannot establish that the taxes it pays compared to water carriers are discriminatory for two reasons. First, CSX fails to meet it evidentiary burden of proof. As previously stated, "[i]n order to succeed on the merits, a plaintiff railroad must prove the discriminatory effects of the tax by a preponderance of the evidence." *Burlington N.*, 911 F.2d at 1300. *See also CSX Transp.*, 131 S. Ct. at 1109 n.8 ("[w]hether the railroad will prevail—that is, whether it can prove the alleged discrimination . . . ."). Here, put simply, CSX offers

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[12] The court in *Midstream Fuel* disagreed with the Alabama Department of Revenue that the "the sales of fuel and supplies consumed on Alabama inland waters are not exempted from sales tax" under Alabama law because such an apportionment scheme "is just not borne out of the express language of the exemption statute." 521 So. 2d at 77.

no evidence regarding the purported discriminatory effect as it relates to water carriers. The stipulated facts merely provide that, according to "an analysis of freight movement published by the United States Department of Transportation, in the year 2002, 82% of freight moved intrastate within Alabama was transported by trucks, 6% by rail, and 1% of freight moved intrastate within Alabama was transported by water." Doc. 63, at 5. Yet, under Alabama law, water carriers involved in solely intrastate transportation are subject to the same sales and use taxes as rail carriers. *See id.* at 4; Ala. Code §§ 40-23-4(a)(10), Ala. Code § 40-23-62(12). Moreover, CSX offered no evidence at trial regarding the alleged discriminatory effects as it relates to water carriers. *See generally* doc. 65. As CSX retains the burden of proof to establish discrimination, the court refuses to assume a discriminatory effect based solely on CSX's allegations.

Additionally, CSX erroneously asks this court to assume that eliminating Alabama's diesel tax exemptions for interstate / foreign water carriers would survive commerce clause scrutiny. The court refuses to engage in this advisory speculation, and, accordingly, finds rail carriers and interstate / foreign water carriers not "the same in all relevant respects." *See CSX Transp.*, 131 S. Ct. at 1108. It is now axiomatic that no federal or constitutional rule categorically prevents Alabama from requiring interstate / foreign water carriers to pay an apportioned share of taxes for activities occurring within the state—"interstate commerce may be made

to pay its way." *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977). Furthermore, to test the constitutionality of a state tax on interstate commerce, courts apply the four part *Complete Auto* test: whether the tax "'[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto*, 430 U.S. at 279). When a state tax involves international commerce, the Court further provided that, to withstand commerce clause scrutiny, "a court must also inquire, first whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. V. Los Angeles Cnty.*, 441 U.S. 434, 451 (1979). *See also Made in the USA Foundation v. United States*, 242 F.3d 1300, 1317-18 (11th Cir. 2001).

Thus, taxing interstate / foreign water carriers' diesel fuel in Alabama's navigable waterways requires a complex analysis involving, among other things, proper apportionment, risk of multiple international taxation, and international comity—factors not present with rail carriers in Alabama. In other words, the court cannot assume that by merely eliminating the exemption for interstate / foreign water carriers, such taxation scheme would survive

commerce clause scrutiny. Upon review, a court may find that such taxation impermissibly burdens interstate and international commerce thereby re-requiring the exemption for these water carriers. As such, the court finds CSX's argument that rail carriers and interstate / foreign water carriers are similarly situated in all relevant respects too speculative—taxation of these water carriers requires a separate and distinct commerce clause analysis. Thus, absent any other evidence from CSX to the contrary, *see supra*, this is a sufficient rationale basis for the Alabama legislature's differential treatment of rail carriers and interstate / foreign water carriers.

IV. CONCLUSION

The Supreme Court mandated that CSX prove the differential treatment rail carriers face in Alabama's sales and use tax scheme is, in fact, discriminatory. As the Department sufficiently demonstrates that rail carriers are not unjustifiably disfavored as it relates to the purchase and use of diesel fuel, the court finds no discrimination under the 4-R Act. The court will enter an order consistent with this Memorandum Opinion dismissing the matter with prejudice.

DONE the 24th day of August, 2012.

s/ Abdul Kallon
ABDUL K. KALLON
UNITED STATES
DISTRICT JUDGE

FILED
2012 Aug-24 PM 04:12
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	)	
Plaintiff,	)	
vs.	)	**CASE NO. 2:08-cv-655-AKK**
ALABAMA DEPARTMENT OF REVENUE and JULIE P. MAGEE, Commissioner of the Alabama Department of Revenue,	)	
Defendant.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the court finds no violation of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501. As such, the court **DISMISSES** CSX Transportation, Inc.'s Complaint **with prejudice**. In light of this decision, the court also **VACATES** its Preliminary Injunction issued on

March 10, 2011, doc. 35, and **ORDERS** the disbursement of the disputed tax funds from the Escrow Fund to the Alabama Department of Revenue.

DONE the 24th day of August, 2012.

s/ Abdul Kallon
ABDUL K. KALLON
UNITED STATES
DISTRICT JUDGE

FILED
2012 May-29 PM 12:35
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	§	
PLAINTIFF,	§	
vs.	§	
ALABAMA DEPARTMENT OF REVENUE and JULIE P. MAGEE, COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,	§	**CASE NO. 2:08-CV-00655-AKK**
DEFENDANT.	§	

DEFENDANTS' POST-TRIAL BRIEF

Comes now the Alabama Department of Revenue and Julie P. Magee, Commissioner of the Alabama Department of Revenue (hereinafter collectively referred to as "Department"), and adopts all arguments previously asserted in its pre-trial brief

(Dkt. 62). In addition to those assertions, the Department hereby makes the following additional arguments in this post-trial brief. The Bench Trial in this case was completed April 25, 2012.

ALABAMA'S GENERALLY APPLICABLE SALES AND USE TAX ON DIESEL FUEL DOES NOT DISCRIMINATE AGAINST RAILROADS IN VIOLATION OF THE 4-R ACT.

Congress' purpose in adopting the Railroad Revitalization and Reform Act of 1976, 49 U.S.C. §11501 ("4-R Act"), was not to grant the railroads preferential treatment, but to "remedy discrimination against the railroads and place them on an even playing field with other state taxpayers". See Atchison, Topeka, and Santa Fe Ry. V. State of Ariz., 78 F. 3d 438, 442 (9th Cir. 1996) (ASTF) citing Ogilvie. (citing Ogilvie v. State Board of Equalization, 657 F. 2d 204, 210 (8th Cir. 1981) cert. denied 454 U.S. 1086, 102 S.Ct. 644 (1991)). Therefore, a tax would be discriminatory under subsection (b)(4) of the 4-R Act "if it imposes a proportionately heavier tax on railroading than on other activities." ATSF at 441 (quoting Burlington N.R.R. v. City of Superior, 932 F.2d 1185, 1187 (7th Cir. 1991)).

While the majority declined to determine if discrimination under the 4-R Act exists, the United States Supreme Court in its dissenting opinion stated that "the best way to read [§11501] (b)(4) is as prohibiting taxes that target or single out railroads

as compared to general commercial and industrial taxpayers," and thus, CSX Transportation Inc.'s ("CSXT") challenge was correctly dismissed. CSX Transp., Inc. v. Alabama Dept. of Revenue, 131 S. Ct. 1101, 1120 (2011) (Thomas, J., Ginsburg J., dissenting). In order to determine if the Department has targeted or singled out railroads for discrimination, the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their competitors must be analyzed. While CSXT would have this Court ignore a tax structure that imposes a tax on the same taxable event (the use and/or consumption of a gallon of diesel fuel), this view is an attempt to misdirect attention away from the logically proper analysis required under the 4-R Act: whether the attendant tax on purchases of diesel fuel, regardless of its label, results in tax discrimination.

In Alabama, diesel fuel is taxed by how it is used, either on-road or off-road. (Transcript p. 57, lines 1-3, DuBose testimony). On-road motor carriers, or truckers, must use clear diesel fuel and thus, are subject to the motor fuels tax imposed by Title 40, Chapter 17 of the Alabama Code. Rail carriers, or railroads, because they travel off-road and use and consume dyed fuel, are specifically exempt from the motor fuels tax, if they pay the sales tax on dyed diesel fuel. See Ala. Code §40-17-2(1); (Transcript p. 57, lines 4-17, DuBose testimony). Instead, railroads are subject to the sales and use tax imposed under Title 40, Chapter 23 I Alabama Code. Water carriers

are subject to Alabama sales and use taxes on purchases of fuel used for intrastate transportation purposes. (Transcript p. 86, lines 6-8, Walls testimony). The exemption from sales tax requires that a vessel travel to a foreign port to be deemed to be engaged in international or interstate commerce. See State Department of Revenue v. Orange Beach Marina, Inc., 669 So. 2d 1279 (1997). See also Ala. Code §§ 40-17-2(1) and 40-17-220(e) (motor carriers-motor fuels tax), 40-23-4(a)(10)(water carriers-sales tax) and 40-23-62(12) (water carriers-use tax); (Transcript p. 86, lines 18-25, p. 87, lines 1-8, Walls testimony). The Department is prohibited from taxing the intrastate portion of the trip, if any part of the trip was interstate. See Dept. of Revenue v. Midstream Fuel Serv., 521 So. 2d 75 (Ala. Civ. App. App. 1988); (Transcript p. 86, lines 9-17, Walls testimony).

Additionally, motor carriers using dyed fuel for off-road purposes, such as to fuel their refrigeration units, or to fuel their engines when they operate exclusively "off the highway" are subject to the same sales and use tax on the purchase and consumption of diesel fuel as the railroads. Examples of "off the highway" use include motor vehicles operating exclusively in a coal pit, highway construction site closed to public use, and on private property within the confines of a plant. See Ala. Admin. Code r. 810-8-1-.17, attached as Exhibit A, and Transcript p. 58, lines 6-22, DuBose testimony; Transcript p.85, lines 17-25, p. 86, lines 1-5 Walls testimony. In fact, all taxpayers of the State of Alabama, who do not pay

the motor fuels tax, and are not exempt by statute, must pay the 4% general rate of sales and use tax on purchases of diesel fuel, as well as any other purchase, whether it be for toothpaste, clothes, food, or any other tangible personal property. See Ala. Code §40-23-2(1); (Transcript p. 81, lines 20-25, p. 82, lines 1-12 Walls testimony).

CSXT reasons that because they must pay the so-labeled "sales" or "use" excise tax and their direct competitors are subject to the "motor fuels" excise tax, CSXT suffers tax discrimination simply because of a label. However, it is important to note that simply because a taxpayer may receive an exemption from one excise tax does not mean that they are not taxed under a differently labeled excise tax on the exact same underlying transaction. There is nothing in the 4-R Act that requires a court evaluating whether a state tax results in tax discrimination against a railroad to ignore a tax structure that imposes a tax on the same taxable event (the use and/or consumption of a gallon of diesel fuel) but merely labels the tax differently. Instead, the 4-R Act requires a determination of whether the attendant tax on purchases of diesel fuel, regardless of its label, results in tax discrimination. Railroads despite being part of the general class of taxpayers subject to a sales tax on their diesel fuel purchases, suffer no tax discrimination when compared to their direct competitors, who themselves pay a differently labeled, and higher, excise tax (motor fuels excise tax) on their purchases of diesel fuel.

It is well-settled law that the United States Supreme Court will give great weight to the characterization of a tax, or interpretation of state law emanating from the highest court of a state, but where a federal question is involved, the Supreme Court is not bound by the label attached to the tax or character ascribed by law, but must determine for itself the true nature of the tax by ascertaining its operation and effect. See e.g. Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 296 U.S. 113, 56 S. Ct. 31 (1935); see also Lawrence v. State Tax Commission, 286 U.S. 276, 280, 52 S. Ct. 556, 557(1932) (Court concerned only with a tax's practical operation, not its precise definition of descriptive words); see also Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 297, 118 S. Ct. 766, 774 (1998) (When the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the Court must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State).

Importantly, CSXT's contentions are not black and white. Motor carriers, arguably the major competitor to railroads, pay motor fuels tax on its purchases of clear on-road diesel fuel. See Ala. Code § 40-17-2(1). To avoid double taxation, the motor carriers are then, and only then, exempt from sales tax as fuel subject to the motor fuel excise tax is not "subject to any other excise tax levied by the state." Id. On the other hand, as argued above, motor

carriers using dyed fuel for off-road purposes, either in refrigeration units, or for "off the highway" use are subject to the sales and use tax levy. See Ala. Code § 40-17-2(1). The same applies for intrastate water carriers. See Ala. Code § 40-23-4(a)(10); 40-23-62(12).

Motor carriers incur a levy of 19 cents per gallon for diesel fuel (motor fuel excise tax), regardless of the price paid per gallon. See Ala. Code §§40-17-2(1) (13 cents per gallon) and 40-17-220(e) (6 cents per gallon). The railroads, however, being subject to the generally applicable sales and use tax are required to pay 4% of the gross proceeds per gallon of diesel fuel purchased, used, or consumed. See Ala. Code § 40-23-2(1). In fact, railroads have consistently paid less state sales and use tax on their purchases of diesel fuel than motor carriers, arguably their main competitor, paid on their purchases of the same diesel fuel.[1] See Defendants' Exhibit 1. CSXT has been, and remains, without any basis to prove discrimination, much less any accompanying damages.

The Alabama Legislature has provided that revenues from Alabama's sales and use tax are

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[1] The Department has not included local sales and use tax in any of its calculations as the Department does not act in concert with nor does it administer, collect, monitor, enforce or provide legal services for the localities where CSXT pay sales and/or use taxes. This argument has previously been set out in the Departments' motion in limine (Dkt. 58) and memorandum brief in support (Dkt. 59). See also Transcript p. 87, lines 18-25, p. 88, lines 1-25, p. 89, lines 1-2 Walls testimony.

distributed as allocated in Ala. Code §§40-23-35 and 40-23-85, with the vast bulk of the proceeds being deposited into the Education Trust Fund for the education of Alabama's school children, as well as, funding of colleges and universities in Alabama. (Transcript p. 87, lines 9-17 Walls testimony). Revenues from gasoline tax and motor fuel tax are distributed according to Ala. Code §§40-17-13, 40-17-31I, 40-17-72, 40-17-23, 40-17-222, and 40-17-223, with the majority of the funds going to the Alabama Department of Transportation Public Roads and Bridge Fund. (Transcript p. 61, lines 17-20, DuBose testimony). All these distributions are to effect public purposes, and the State is constitutionally and legislatively prohibited from levying and collecting taxes to construct and maintain CXST's privately owned track structures as CSXT implies. See The Alabama Consitution of 1901, Article IV, §93; Carmichael v. Southern Coal & Coke Co., 301 U. S. 514, 57 S. Ct. 874 (1937).

At trial, CSXT attempted to advance the theory that the disposition of the two differently labeled taxes should somehow be dispositive of CSXT's claim. Instead, the presented testimony had the opposite effect. CSXT offered Dr. Richard Mudge to develop some sort of "benefit tax." According to Dr. Mudge, "he or she who benefits from a particular expenditure should pay for it; that if you don't benefit from it, you shouldn't pay for it." (Transcript p. 39, lines 13-16). While the Department disagrees with this theory, as arguably every taxpayer could turn any given benefit from the collection of taxes

into a deficit[2], Dr. Mudge's own testimony illustrates how CSXT benefits from the disposition of both the sales and use tax and the motor fuels tax. On cross-examination, Dr. Mudge had to admit that railroads today could not exist without a viable highway system, and that "[t]he freight movements use the entire network." (Transcript p. 45, lines 15-25, p. 46, lines 1-17, p. 47, lines 2-5). Whether ABC Trucking Company, CSXT's own fleet of trucks, or Mr. Joe Citizen, diesel truck owner, pays motor fuels tax, CSXT and all railroads benefits from the motor fuels tax. Neither the railroads, truckers, nor private citizens get the highway system as a gift, on that Dr. Mudge is correct, but they all get a benefit from a well-maintained highway system.

Dr. Mudge further testified that CSXT benefits from a well-educated workforce. (Transcript p. 48, lines 12-14, p. 49, lines 4-16). In fact, everybody in Alabama, or who does business with Alabamians, benefits from a well-educated workforce which is funded from the disposition of sales and use taxes. Therefore, in the words of counsel for CSXT, a benefits and burdens analysis comparison of the disposition of the proceeds from the motor fuels taxes and the sales and use taxes "gets pretty dicey."

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[2] For example, a taxpayer with children in private school could attempt to argue that he or she should not have to pay sales and use tax on food, clothes, etc. because the children do not benefit from the Education Trust Fund that funds public education. By the same token, a citizen without a vehicle could attempt to argue that there is no benefit received for the Public Road and Bridge Fund.

Transcript p. 51, line 21). If the proceeds to which the disposition of the taxes should be considered at all, the fact that the sales and use taxes fund the Alabama Education Trust Fund, a "public good" according to Dr. Mudge, (Transcript p. 48, lines 22-25), should certainly be taken into account.

CSXT presented testimony by Vickie Friedman as to what taxes CSXT pays in Alabama in comparison to motor carriers. However, Ms. Friedman's analysis was incomplete. First of all, Ms. Friedman had a problem with the Department's Exhibit 1, a comparison of state sales taxes paid by CSXT on dyed diesel fuel to state motor fuels taxes paid on undyed diesel fuel, as it only looks ta the state rate per gallon. (Transcript p. 21, lines 12-16 Friedman testimony). As stressed above, the local tax was not included as the Department does not administer local sales and use tax for the relevant locals included in his lawsuit. More importantly, however, Ms. Friedman did not include local motor fuels tax paid in the local jurisdictions, with the exception of Birmingham. (Transcript p. 30, lines 13-25, p. 31 lines 1-7). As Steve DuBose testified, localities in Alabama do have local motor fuels tax that varies from 1 to 6 cents a gallon. (Transcript p. 60, lines 6-23 Du Bose testimony). Fair is fair; if the Department's chart is incomplete, then so is the exhibit prepared by Ms. Friedman. Additionally, Ms. Friedman included property taxes paid by CSXT on property owned in Alabama, but was unaware that trucking businesses pay property tax as well, because she is "not a property tax person."

(Transcript p. 31, lines 8-10 Friedman testimony). Every property owner in the State of Alabama plays property tax unless specifically exempt. See Ala. Code § 40-11-1. Not only must CSXT pay property tax on its property owned in the State of Alabama, but so must trucking companies, barge services, and Mr. Joe Citizen.

Ms. Friedman was unaware that truckers have to pay sales tax on purchases of tangible personal property, just as the railroads, and for that matter, all taxpayers must, unless specifically exempted. (Transcript p. 32, lines 1-3 Friedman testimony; p. 81, lines 20-25, p. 82, lines 1-6 Walls testimony); See Ala. Code §40-23-2(1). There is also a 2 percent sales tax on the purchase of motor vehicles in Alabama. See Ala. Code § 40-23-101(a). More importantly, Ms. Friedman was unaware that motor carriers do pay sales tax on dyed diesel fuel, nor did she take into account the cost of compliance truckers have to bear in order to be regulated in Alabama. (Transcript p. 29, lines 23-25, p. 30, lines 1-4, p. 30 lines 23-25). Both Mr. DuBose and Mr. Walls testified that motor carriers were required to pay sales and use tax on their purchases of dyed diesel fuel for "off-the highway use." (Transcript p. 58, lines 6-22, DuBose testimony; Transcript p.85, lines 17-25, p. 86, lines 1-5 Walls testimony). Mr. Jay Starling, in his testimony, explained the regulation of motor carriers by detailing the International Registration Plan (IRP), and International Fuel Tax Agreement (IFTA) and how these programs apply to the regulation of truckers in Alabama. (Transcript p. 68-79).

When the foregoing taxes imposed on railroads, motor carriers, and water carriers is examined, the railroads do not suffer discrimination for paying sales and use tax on diesel fuel. Railroads do not pay a disproportionate amount of tax simply because they pay sales and/or use tax on their purchase, use and/or consumption of dyed off-road diesel fuel. In fact, Alabama's overall tax structure results in approximately equal tax treatment of all carriers.

CONCLUSION

Based on the foregoing, Alabama's sales and use tax on diesel fuel is generally applicable and is not "another tax that discriminates against a rail carrier" in violation of the 4-R Act as it does not single out or target railroads for discrimination, but merely imposes a differently labeled tax on the same gallon of diesel fuel as that purchased by CSXT's competitors and/or other commercial taxpayers.

Therefore, CSXT's claims for relief are due to be denied.

Respectfully submitted this 19th day of May, 2012.

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CERTIFICATE OF SERVICE

I, Margaret Johnson McNeill, hereby certify that a copy of the foregoing has been served upon the following parties by the CM/ECF electronic filing system on this 29th day of May, 2012.

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ATTACHMENT

ALABAMA DEPARTMENT OF REVENUE

BUSINESS & LICENSE TAX DIVISION

MOTOR FUELS TAX RULE

810-8-1-.17. Dyed Motor Fuel for a Motor Vehicle used Exclusively "Off the Highway".

(1) The excise tax does not apply with respect to dyed motor fuel which the user establishes to the satisfaction of the Department is used in the exclusive operation of a motor vehicle "off the highway".

(2) "Off the highway" includes private property, a way or place permanently or temporarily closed to public use for the purpose of vehicular travel.

(3) "Off the highway" motor vehicle is any vehicle which presently does not have to be registered for highway use.

(4) A motor vehicle displaying a license plate from this state or any other state is presumed to use motor fuel exclusively for use on the highways of this state and the excise tax will apply. When a vehicle licensed by this state is permanently withdrawn from highway use for exclusive "off the highway" use, license plates must be removed from the vehicle or the excise tax will apply.

(5) A public highway or highway consists of every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle located either within a municipality or in unincorporated territory, and laid out or erected as such by the public or dedicated or abandoned to the public or intended for use by or for the public. The term "Public Highway" shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions.

(6) A motor vehicle is operated upon the highway if it moves any distance upon the paved or unpaved portion of the highway. A vehicle is not considered operating on the highway when the vehicle merely crosses the highway from private property on one side to private property directly on the other, and the vehicle is not operated for any distance in the general direction of the highway in making the crossing.

(7) Examples of "off the highway" use are:
(a) Motor vehicles operating exclusively in a coal pit.

(b) Motor vehicles operating exclusively on a highway construction site closed to public use.

(c) Motor vehicles operating exclusively on private property within the confines of a plant.
(8) A motor vehicle cannot be designated for both "highway" and "off the highway" use. The exemption from tax applies to motor vehicles used exclusively "off the highway."

(9) Any user claiming exemption from excise tax for "off the highway" use shall accurately maintain adequate records to show the operations claimed to be exempt.

(10) Adequate records substantiating exclusive "off the highway" use shall contain the following documentation:
(a) Make, model, number designation of the vehicle, e.g., Ford Dump Truck, Number 102.

(b) Specific area of motor vehicle operation, e.g., plant area only.

(c) Daily log showing distance travelled and amount of fuel used by the motor vehicle.

(Sections 40-17-18 and 40-17-221(b), Code of Alabama 1975) History: Amendment filed with LRS January 19, 1996. Certification filed with LRS April 29, 1996, effective date June 3, 1996.

FILED
2012 June 8 PM 02:18
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	§	
PLAINTIFF,	§	
vs.	§	
ALABAMA DEPARTMENT OF REVENUE and	§	**CASE NO. 2:08-CV-00655-AKK**
JULIE P. MAGEE, COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,	§	
DEFENDANT.	§	

DEFENDANTS' POST-TRIAL REPLY BRIEF

Comes now the Alabama Department of Revenue and Julie P. Magee, Commissioner of the Alabama Department of Revenue (hereinafter collectively referred to as "Department"), and adopts all arguments previously asserted in its pre-trial brief

(Dkt. 62), and post–trial brief (Dkt. 67). The majority of the arguments contained in the post–trial brief of CSX Transportation, Inc. ("CSXT") have already been addressed by the Department in its previous submissions and will not be readdressed here. There are, however, a few points which merit comment.

The issue in this case is discrimination. Specifically, whether the State of Alabama discriminates against rail carriers with regard to the purchase, use or consumption of diesel fuel used to propel locomotives. In order to determine whether discrimination exists, the tax structure that applies to the subject of the tax (purchase, use or consumption of diesel fuel) as compared to both the railroads and their competitors must be evaluated. Put another way, the proper analysis to determine discrimination in this case is to look at the taxable event (the purchase, use or consumption of a gallon of diesel fuel) and the tax that applies, regardless of its label. Importantly, while the majority declined to determine if discrimination under the 4-R Act exists, the United States Supreme Court in its dissenting opinion gave both a standard and a determination by stating that "the best way to read [§11501] (b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers," and thus, CSXT's challenge was correctly dismissed. CSX Transp., Inc. v. Alabama Dept. of Revenue, 131 S. Ct. 1101, 1120 (2011) (Thomas, J., Ginsburg J., dissenting). The only way to determine if the Department has targeted or singled out railroads for discrimination,

is to look at the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their competitors. Whether it is labeled a sales tax, or a motor fuels tax, a tax by any other name is still a tax.

In Norfolk Southern Railway Co. v. Alabama, No. 2:08-cv-00285 – HGD (N.D. Ala. April 9, 2008), Magistrate Judge Davis correctly applied and analyzed in detail the case law and held that not only did rail carriers not pay a disproportionate amount of taxes, but that Alabama's tax scheme "results in roughly equal treatment" as compared to rail carriers' competitors. Slip Op. at 32. It is important to note that the United States Supreme Court did not comment on Magistrate Judge Davis' holding on the merits but instead only held that rail carriers could challenge state sales and use taxes under the 4-R Act. See CSX Transp., Inc. v. Alabama Dept. of Revenue, 131 S. Ct. 1101 (2011).

The testimony presented at trial clearly proved that the generally applicable state sales tax[1] paid by CSXT on diesel fuel does not discriminate against the railroads, and that the railroads are indeed

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[1] The Department has not included local sales and use tax in any of its calculations as the Department does not act in concert with nor does it administer, collect, monitor, enforce or provide legal services for the localities where CSXT pay sales and/or use taxes. This argument has previously been set out in the Departments' motion in limine (Dkt. 58) and memorandum brief in support (Dkt. 59). See also Transcript p. 87, lines 18-25, p. 88, lines 1-25, p. 89, lines 1-2 Walls testimony.

paying less state tax on their purchases of diesel fuel. Certainly, the 19 cent per gallon state motor fuels tax paid by CSXT's principle competitor, motor carriers, far exceeds what CSXT has paid according to CSXT's own figures. See Transcript p. 83, lines 15-25, p. 84, lines 1- 25, p. 85, lines 1- 5 Wall's testimony; Defendants' Exhibit 1.

Finally, CSXT's claim that Alabama's tax structure is discriminatory because revenue collected from motor carriers is used to repair the roads and highways of Alabama, while CSXT must repair their privately owned track and roadway structures, is without merit. The Alabama Constitution of 1901, Article IV, §93 prohibits state interest in private or corporate enterprises. In addition, since the adoption of the Fourteenth Amendment to the United States Constitution, "state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes." Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 514, 57 S, Ct. 868, 874 (1937). However, most important of all is the fact that the vast bulk of revenues from Alabama's sales and use taxes are deposited into the Education Trust Fund for the education of Alabama's school children, as well as, funding of colleges and universities in Alabama. (Transcript p. 87, lines 9-17 Walls testimony). CSXT's own expert testified that education is a "public good." (Transcript p. 48, lines 22-25). For a state in fiscal crisis struggling to stay out of proration, the equity of the sales and use tax favors the Department.

CONCLUSION

Based on the foregoing, Alabama's sales and use tax on diesel fuel is generally applicable and is not "another tax that discriminates against a rail carrier" in violation of the 4-R Act as it does not single out or target railroads for discrimination, but merely imposes a differently labeled tax on the same gallon of diesel fuel as that purchased by CSXT's competitors and/or other commercial taxpayers.

Therefore, CSXT's claims for relief are due to be denied.

Respectfully submitted this 8th day of June, 2012.

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[LETTERHEAD]

September 19, 2013

Mr. John C. Neiman, Jr.
Solicitor General
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501 Washington Avenue
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Re: Alabama Department of Revenue, et al.
v. CSX Transportation, Inc.
Application No. 13A275

Dear Mr. Neiman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on September 19, 2013 extended the time to and including October 30, 2013.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by s/ Jacob C. Travers

Jacob C. Travers
Case Analyst

NOTIFICATION LIST

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OPPOSITION BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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December 16, 2013

QUESTION PRESENTED

Whether the court of appeals correctly held that Alabama's sales and use tax on fuel that requires rail carriers to pay the tax, but completely exempts motor and interstate water carriers who compete against the rail carriers, constitutes a type of discrimination that violates 49 U.S.C. § 11501(b)(4).

RULE 29.6 STATEMENT

CSX Corporation is the parent company of respondent. No other publicly held corporation has a 10% or greater ownership interest in respondent.

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INTRODUCTION

The petition for a writ of certiorari presents no question worthy of this Court's review. The petition rests on a purported "conflict" among the courts of appeals on the proper comparison class for determining whether a state non-property tax unlawfully discriminates against railroads in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"). There is no conflict. The decisions characterized by the petition as "conflicting" merely used different comparison classes to address different taxing schemes and forms of discrimination challenged in particular cases. The courts made clear that their choices of comparison classes were case-specific, and not categorical rules for all 4-R Act cases, and the choice of comparator class always has a common thread – protection of rail carriers from taxing schemes resulting in discriminatory treatment that would impair their survival in part by threatening their financial stability. Accordingly, the courts of appeals have not decided like cases differently, and there is no disagreement among them that warrants this Court's review.

Even if there were a conflict, this case would not be an appropriate vehicle for resolving it because – as the district court and court of appeals both found – petitioners Alabama tax authorities ("Alabama") agreed to the comparison class that it now seeks to challenge. Alabama therefore waived the issue it seeks to present to this Court. In all events, the decision below involving only a single State's particular taxing scheme does not raise a question of recurring or exceptional importance.

STATEMENT OF THE CASE

A. Statutory Background

Rail carriers were subject to discriminatory state and local taxation for decades prior to the 4-R Act's enactment in 1976. Congress first surveyed the nature and impact of the discrimination in 1961, see S. Rep. No. 87-445, at 449-66 (1961), and later found that rail carriers were "'easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). Congress quantified the impact of the discrimination to be "at least $50 million each year." H.R. Rep. No. 94-725, at 78 (1975); see also S. Rep. No. 91-630, at 1 (noting "long-standing burden on interstate commerce" created by discriminatory state taxation of railroads). Congress eventually concluded that the "temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents . . . made federal legislation in this area necessary." *W. Air Lines*, 480 U.S. at 131.

In the face of numerous railroads declaring bankruptcy, Congress enacted protective legislation as part of the 4-R Act. The 4-R Act's purpose is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Pub. L. No. 94-210, § 101(a), 90 Stat. at 33. Congress sought to "foster competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801(b)(2), and in particular to ban discriminatory state and local taxation of railroads.

Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, prohibits such tax discrimination, setting forth four forbidden taxing schemes deemed to "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first three schemes specifically concern property taxes. Subsection (b)(1) prohibits assessing railroad property value at a higher ratio to its true market value than the ratio of assessed value to true market value of "other commercial and industrial property." *Id.* § 11501(b)(1). Subsection (b)(2) prohibits levying a property tax based on such an assessment. *Id.* § 11501(b)(2). And subsection (b)(3) prohibits levying a property tax at a higher rate than the rate imposed on other "commercial and industrial property." *Id.* § 11501(b)(3). Those discriminatory practices were common prior to the 4-R Act. See S. Rep. No. 91-630, at 3.

Congress did not limit the reach of section 306 to those most obvious and blatant forms of existing tax discrimination. In subsection (b)(4), Congress also prohibited the States from "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." 49 U.S.C. § 11501(b)(4).[1] The provision came into being when Congress "realized near

---

[1] As originally enacted in 1976, section 306 prohibited the "imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad"; the amended text (also recodified) prohibits "*another tax* that discriminates against" a rail carrier. *Compare* Pub. L. No. 94-210, § 306(1)(d), 90 Stat. at 54, *with* Pub. L. No. 95-473, § 11503(b)(4), 92 Stat. 1337, 1446 (1978). The amendment and recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. at 1466; *see CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1105 n.1 (2011).

the end [of the legislative process] that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation," and "added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987). As one court described it, subsection (b)(4) "is a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

B. Proceedings Below

1. CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate commerce. Pet. App. 2a. CSXT operates in Alabama, and is subject to taxation by Alabama and its subdivisions. *Id.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code § 40-23-26(c), and a use tax on the storage, use, or consumption of tangible personal property, *id.* § 40-23-60. The state sales and use tax, levied at a four percent rate, applies to the railroads' purchase, consumption, and use of diesel fuel in Alabama. Pet. App. 2a. Revenues from the state sales and use tax are deposited in the State's general revenue fund. *Id.* at 4a (citing Ala. Code § 40-23-35). Alabama law also permits counties and municipalities to impose additional sales and use taxes, which correspond to and parallel the sales and use tax imposed by the State itself. *Id.* at 35a-36a. The imposition of these county and municipal sales and use taxes results in CSXT paying in many areas much more than the four percent state sales and use tax. *Id.* at 36a. The railroads' principal competitors in Alabama, motor carriers and interstate water carriers, are exempt from state and local sales and

use taxes on the purchase and consumption of diesel fuel. *Id.* at 2a-3a.[2]

Water carriers benefit from an exemption from sales and use taxes for fuel used by vessels engaged in interstate or foreign commerce. Ala. Code §§ 40-23-4(a)(10), 40-23-62(12). Nearly all water carrier transport in Alabama is in interstate or foreign commerce. See *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, No. 2:08-cv-00285-HGD, 2008 WL 6515212, at *4, *14 (N.D. Ala. Apr. 9, 2008), *aff'd*, 550 F.3d 1306 (11th Cir. 2008), *abrogated by* 131 S. Ct. 1101 (2011).[3]

2. On April 14, 2008, CSXT filed this action in federal district court against Alabama. The complaint alleged that the 4-R Act prohibits the State of Alabama, and counties and municipalities within Alabama, from imposing sales and use taxes on CSXT's purchase and consumption of diesel fuel because the exemptions granted to motor carriers and interstate water carriers discriminate against CSXT within the meaning of § 11501(b)(4).

The district court initially dismissed CSXT's complaint, based on Eleventh Circuit precedent holding that an exemption to a generally applicable non-property tax could not be challenged under subsection

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[2] Fuel used by motor carriers is subject instead to a fixed state motor fuel excise tax of 19 cents per gallon. Ala. Code §§ 40-17-2(1), 40-17-220(e). Under Alabama law, the proceeds from the motor fuel excise tax must be devoted to the construction, repair, and maintenance of public roads and bridges; to the costs of tax collection; and to pay the principal and interest on bonds previously issued to finance the building of roads. *Id.* §§ 40-17-13, 40-17-146, 40-17-222. Because motor carriers are subject to the excise tax and not to the sales and use tax, their tax burden does not fluctuate with the price of fuel.

[3] Fuel used by water carriers in interstate or foreign commerce is not subject to the motor fuel excise tax either.

(b)(4). See *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, 550 F.3d 1306 (11th Cir. 2008), *abrogated by* 131 S. Ct. 1101 (2011). The Eleventh Circuit in *Norfolk Southern* rested its analysis on this Court's decision in *Department of Revenue* v. *ACF Industries*, 510 U.S. 332 (1994), which held that subsection (b)(4) may not be invoked to challenge the imposition of a property tax on railroad property on the ground that certain non-railroad property is exempt from the tax. On appeal, the Eleventh Circuit affirmed on the basis of *Norfolk Southern. CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 350 F. App'x 318, 319 (11th Cir. 2009) (per curiam) (*CSXT I*).

This Court granted certiorari and reversed. *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011) (*CSXT II*). The Court held that "a state [non-property] tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier.'" *Id.* at 1109. It did not address, however, whether CSXT should prevail in its challenge here, leaving for the lower courts to decide "whether . . . Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114. Justices Thomas and Ginsburg dissented. They agreed that "a scheme of tax exemptions is capable of making a tax discriminatory," *id.* at 1115, but would have addressed the merits of CSXT's challenge. They would have rejected that challenge on the ground that a discriminatory tax within the meaning of subsection (b)(4) is "a tax – or tax exemption scheme – that targets or singles out railroads as compared to other commercial and industrial taxpayers," and that "CSX cannot prove facts that would satisfy that standard." *Id.*

On remand, the district court conducted a half-day bench trial and upheld Alabama's taxing scheme. In its opinion, the district court noted twice that Alabama agreed that the proper comparison class for the discrimination analysis was CSXT's competitors. Pet. App. 45a ("it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison"); *id.* at 51a ("the parties here agree on a different class for comparison purposes – the competitive mode class, not the 'all other comercial and industrial taxpayers' class"). Applying that comparison, the district court found that the sales and use tax is not discriminatory because, when considered along with the excise tax paid by motor carriers, "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a. It further found that CSXT failed to establish the tax's "alleged discriminatory effects as it relates to water carriers." *Id.* at 64a.

The court of appeals reversed. Pet. App. 1a-29a (*CSXT III*). It also noted twice that Alabama conceded that the proper comparison class for the discrimination analysis is CSXT's competitors. Pet. App. 8a ("In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers."); *id.* at 11a ("CSX and the State stipulated, and the district court agreed, that the proper comparison class for this case was CSX's competitors"). The court further stated that it agreed that the competitor comparison class is proper "in the context of a state's sales tax on diesel fuel," but emphasized that it was not adopting a "bright-line rule for [the comparison class for] § 11501(b)(4) cases." *Id.* at 11a-12a & n.4. Applying this comparison, the court of appeals held that Alabama's sales and use tax is

discriminatory because "[r]ail carriers pay the Sales tax – motor and water carriers do not." *Id.* at 16a.

Judge Cox dissented. He agreed that "the appropriate comparison class consists of the stipulated competitors," Pet. App. 18a, but he would have considered the separate excise tax imposed on motor carriers. In his view, the sales and use tax exemption for motor carriers is not discriminatory because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* He would have remanded for reconsideration as to interstate water carriers because "the district court improperly placed the burden on CSX to provide evidence of the exemption's discriminatory effect," *id.*, thereby opening another possibility of impermissible discrimination.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CREATE OR WIDEN A CIRCUIT SPLIT.

The principal ground on which the petition rests is a supposed conflict among the circuits on the proper comparison class for subsection (b)(4) cases under the 4-R Act. Pet. 11-15. Alabama asserts that the decision below "deepen[s]" this "entrenched circuit split." *Id.* at 11. This is incorrect. There is no "entrenched" conflict, and the decision below did not create one or deepen one.

To be sure, the decisions that Alabama cites show that lower courts have used different comparison classes in different cases to resolve claims that state taxing schemes discriminated against railroads in violation of subsection (b)(4). But this does not pose a "conflict." Instead, it simply shows that railroads have brought different types of discrimination chal-

lenges against different state taxing schemes, and that courts have employed different comparisons as appropriate to address the specific taxing schemes and discrimination claims under consideration. Indeed, the courts of appeals, including the Eleventh Circuit below, expressly stated that they were *not* adopting categorical rules to define the proper comparison class for all subsection (b)(4) cases; instead, the courts limited their analyses to the facts presented to them and made clear that they might employ different comparison classes in different circumstances. Thus, the circuits are not using conflicting legal standards to reach inconsistent results in like cases; instead, they have properly recognized that "discrimination" can apply differently in multiple settings, and that different cases call for different comparisons. What they share in common is fidelity to Congress's fundamental purpose in enacting (b)(4) to protect railroads against pernicious forms of non-property taxation, no matter the form of discrimination. Nothing in the lower court decisions warrants this Court's intervention.

1. Alabama acknowledges that the decision below is in harmony with a group of lower court decisions that have invalidated as discriminatory substantially similar state sales and use taxes paid by railroads that exempted the railroads' competitors. Pet. 13-15; *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007) (Minnesota sales and use tax on transportation fuel that exempted motor and air carriers); *Burlington N. Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999) (Missouri sales and use tax on diesel fuel and gasoline that exempted trucks and barges); *Burlington N. R.R.* v. *Comm'r of Revenue*, 509 N.W.2d 551 (Minn 1993) (Minnesota sales and use tax on railroad rolling stock and repair parts that

exempted barges, airplanes and motor carriers); *Kan. City S. Ry.* v. *Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007) (Louisiana sales and use tax on transportation fuel that exempted motor carriers and water carriers); *Ill. Cent. R.R.* v. *Tenn. Dep't of Revenue*, No. 3:10-cv-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013), *appeal pending*, No. 13-6348 (6th Cir. filed Oct. 16, 2013) (Tennessee sales and use tax on diesel fuel that exempted motor carriers).[4]

In each of these cases, the sales and use taxes were applicable to a wide variety of purchasers and consumers, including commercial and industrial taxpayers (but not the railroads' competitors). Accordingly, the railroads did not claim that the taxes discriminated against them as compared to other commercial and industrial businesses. Instead, the railroads' claim was that the taxes discriminated against them as compared to their direct competitors. See, *e.g.*, *Lohman*, 193 F.3d at 985; *Union Pac.*, 507 F.3d at 694; *Burlington N.*, 509 N.W.2d at 553.

The courts uniformly agreed that such claims by railroads that their competitors receive preferential tax treatment are cognizable under subsection (b)(4) of the 4-R Act, and therefore used competitors as the comparison class for analyzing, and ultimately invalidating, the sales and use taxes at issue. The Eighth Circuit's analysis in *Lohman* is illustrative. As a matter of statutory construction, the court reasoned that Congress's failure to specify a comparison

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[4] Courts have also employed the competitor comparison class when enjoining taxes on railroad diesel fuel imposed under schemes other than a general sales and use tax. *See Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338, 346 (Iowa 1983); *Burlington N. R.R.* v. *Triplett*, 682 F. Supp. 443, 445-46 (D. Minn. 1988).

class in (b)(4), when it specified one in the three property tax provisions in (b)(1)-(3), was "intended," and showed that "the purpose of the catchall was to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques." 193 F.3d at 985-86. The court further concluded that recognizing claims of discrimination based on preferential treatment of competitors is consistent with the 4-R Act's "broader purpose" of "restor[ing] the railroads' financial stability," which cannot be achieved "without making the railroads competitive." *Id.* at 986; see also *Burlington N.*, 509 N.W.2d at 553 (using competitors as the comparison class "is in keeping with the purpose of the 4-R Act: to revitalize the railroad industry by making it competitive").

Notably, in using competitors as the comparison class to resolve the particular claims before them, several of the courts expressly noted that their adoption of this comparison class was case-specific and that other comparison classes might be appropriate in different circumstances. See *Lohman*, 193 F.3d at 986 ("the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case"); *Burlington N.*, 509 N.W.2d at 553 (adopting competitors as the proper comparison class "here," and distinguishing cases using a broader comparison class on the ground that those cases did not "deal[] with the situation where the railroad is subject to a general tax but its competitors are not"); *Ill. Cent.*, 2013 WL 4521013, at *5 (finding competitors to be the "more appropriate" comparison "with respect to Tennessee's sales and use taxes at issue here"). The two other courts adopted competitors as the proper comparison class for the case-specific reason that the parties had stipulated to its use. See *Union Pac.*, 507 F.3d at 695

("[t]he Railroads and the State agree that for purposes of this appeal the competitive mode class is the proper comparison class"); *Bridges*, 2007 WL 977552, at *7 (same). Accordingly, none of the courts adopted a categorical rule that competitors are the proper comparison class for all subsection (b)(4) cases and all circumstances. Instead, the courts left open the possibility that they will use other comparison classes in future cases.

The Eleventh Circuit's decision is consistent with all of these rulings. Faced with a state sales and use taxing scheme that is substantially similar to the ones at issue in the foregoing cases, the Eleventh Circuit used the same comparison class (competitors of railroads) to reach the same result: invalidating the taxing scheme as a violation of the 4-R Act. The court of appeals reasoned that "in the context of a state's sales tax on diesel fuel," the competitive model "best serves" the 4-R Act's "purpose of ensuring 'financial stability' for rail carriers." Pet. App. 11a. The court also relied upon the fact that the parties had agreed to the use of this comparison class. *Id.* The court emphasized, however, that its ruling did not "create[] tension" with other decisions that have employed a broader comparison class because it was not adopting "a bright-line rule." *Id.* at 11a-12a n.4 (citing *Kan. City S. Ry.* v. *Koeller*, 653 F.3d 496 (7th Cir. 2011)). Instead, the court of appeals expressly held that "the language and purpose of § 11501(b)(4) require that 'the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.'" *Id.* (quoting *Lohman*); see also *id.* at 11a n.3 (noting that the broad comparison class "might be appropriate in certain situations," but that it "fails to address discriminatory taxes that

place rail carriers at a significant disadvantage vis-à-vis their competitors").

Given the courts' express acknowledgements that different comparison classes are appropriate in different subsection (b)(4) cases, the decision below and the other sales and use tax decisions simply do not conflict with decisions that have employed different comparison classes in a way that warrants this Court's review. In all events, the three circuit decisions that Alabama relies upon pose no conflict, as shown below.

2. Alabama contends that the decision below and the sales and use tax cases that are consistent with it conflict with the decisions of three courts of appeals that have employed a broader comparison class – all commercial and industrial taxpayers – in subsection (b)(4) cases: *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry.* v. *Arizona*, 78 F.3d 438 (9th Cir. 1996); and *Kan. City S. Ry.* v. *Koeller*, 653 F.3d 496 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 885 (2011). See Pet. 11-13. None of these decisions poses a conflict.

a. *McNamara* involved a railroad's challenge under subsection (b)(4) to Louisiana's Transportation and Communication Utilities ("T & C") tax, which taxed 2% of the intrastate gross receipts of "'public utilities'" in Louisiana, including railroads, motor freight lines, boat lines, telephone and telegraph companies, and pipe lines. 817 F.2d at 370 & n.1. The railroad's discrimination claim was that this industry-specific tax improperly burdened railroads and a small group of other utilities relative to "'all other commercial and industrial taxpayers.'" *Id.* at 374. Thus, in contrast to the sales and use tax cases, the railroad in *McNamara* argued that the proper comparison class was all commercial and industrial taxpayers. Louisiana, on the other hand, *defended* the

statute on the ground that it was not discriminatory because it also applied to the railroad's main competitors. *Id.* at 374-75. Thus, it was the State in *McNamara* that argued for a narrower comparison class consisting of the railroad's competitors. *Id.*

The court of appeals agreed with the railroad's theory of discrimination and held that Louisiana's tax that applied only to railroads and other utilities violated the 4-R Act. It reasoned that a central objective of the 4-R Act is "to tie [railroads'] tax fate to the fate of a large and local group of taxpayers," and that "[t]he class of taxpayers subject to the T&C tax is simply too small and too foreign to fulfill this function," even if it also imposed an "unfair burden" on the other transportation companies subject to the tax. *Id.* at 375. As the court explained, a State cannot be permitted to discriminate against railroads "by simply making sure that only a few powerless business taxpayers" pay the same tax. *Id.* at 375 n.13.

This ruling poses no conflict with the decision below or the other decisions that are in accord with it. The Fifth Circuit's use of a broad comparison class in *McNamara* was prompted by, and appropriate to, the taxing scheme at issue and the railroad's challenge to it. Indeed, CSXT has no quarrel with the Fifth Circuit's use of a broad comparison class (which the railroad had proposed) or with its conclusion that Louisiana's tax discriminated against railroads in violation of the 4-R Act. The Fifth Circuit, however, simply did not reach the question whether other comparison classes might be appropriate in other circumstances. In particular, *McNamara* did not involve any differential treatment of a railroad and its competitors, so the court had no occasion to consider whether competitors are the proper comparison class for addressing a tax that applies to commercial and

industrial businesses, but exempts railroad competitors. In sum, *McNamara* is distinguishable on its facts and provides no basis for concluding that the Fifth Circuit would have reached a different result if presented with this case.[5]

b. The same is true of *Koeller*. *Koeller* involved a challenge by two railroads under subsection (b)(4) to a new assessment imposed by an Illinois drainage district that would have increased their annual assessments by 4800% and 8300%, respectively, while other property owners in the district, including commercial and industrial businesses, faced increases of only a fraction of these percentages. 653 F.3d at 502. The railroads claimed that this grossly unbalanced tax structure violated the 4-R Act and the Seventh Circuit agreed. The court found that the new assessment scheme improperly "targeted" the railroads and that this discriminatory treatment was intentional. *Id.* at 510-12; *id.* at 511 (citing "glaring evidence" that the "discriminatory result" was "exactly what the [drainage district] meant to do").

The Seventh Circuit found that the proper comparison class for evaluating the railroads' claim was "all other commercial and industrial taxpayers," rather than the railroads' competitors. *Id.* at 508-10. One of its principal reasons for doing so, however, was that the drainage assessment did not apply to any of the railroads' competitors. *Id.* at 509 ("there are *no* competitors of the railroads . . . that [the drainage

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[5] Notably, although Louisiana is in the Fifth Circuit, the district court in *Bridges* did not hesitate to use the competitor comparison class, and did not feel constrained by any notion (advanced by Alabama here) that *McNamara* precludes such a comparison class. In fact, the *Bridges* court relied heavily upon and frequently cited *McNamara* in its decision. Louisiana did not appeal the *Bridges* decision.

district] is trying to tax") (emphasis in original). Accordingly, the court found that a broader comparison class was the only way to conduct a "meaningful analysis." *Id.* at 510. In addition, the Seventh Circuit explained that its adoption of the broader comparison class was not "incompatible with the Eighth Circuit's *Lohman* decision, which compared the railroads to their direct competitors," because it agreed with the Eighth Circuit that "'the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.'" *Id.* at 509 (citing *Lohman*, 193 F.3d at 986); *id.* (selecting broad comparison class "for now" and leaving "later case[s]" for "another day").

Koeller thus does not pose a conflict. Like the Fifth Circuit's ruling in *McNamara*, the Seventh Circuit's use of a broad comparison class in *Koeller* appropriately resolved the particular discrimination claim presented in that case. Moreover, the Seventh Circuit expressly disavowed any "incompatib[ility]" between its approach and that of the courts that have used competitors as the comparison class because it agreed that the choice of the proper comparison class is a case-specific inquiry.

c. The Ninth Circuit's decision in *Atchison Topeka* likewise does not pose a conflict. In this 2-1 decision, the Ninth Circuit addressed a railroad's challenge under subsection (b)(4) to Arizona's transaction privilege tax (which "is similar to a sales tax") and use tax, which applied to "most businesses in Arizona," but exempted motor carriers. 78 F.3d at 439. The majority held that the proper comparison class consisted of "'all industrial and commercial taxpayers who are subject to the tax.'" *Id.* at 442. It then rejected the railroad's claim that the taxing scheme's exemption for motor carriers was discrimin-

atory because it concluded that under this Court's decision in *ACF Industries*, the railroad's challenge to the exemption was not cognizable under subsection (b)(4). *Id.* at 442-43; see also *id.* at 442 (finding that "the discriminatory exemption argument fails" under *ACF*). The dissenting judge would have used the railroad's competitors as the comparison class and would have struck down the tax. *Id.* at 444-46.

Atchison Topeka is no longer good law because its conclusion that the tax exemption could not be challenged under subsection (b)(4) was overruled by this Court in *CSXT II*. See *CSXT II*, 131 S. Ct. at 1107 n.4 (citing *Atchison Topeka* as one of the cases comprising the circuit split that prompted the Court's review). Given the Ninth Circuit's erroneous view that the railroad's claim of discrimination based on a tax exemption for its principal competitor was not cognizable at all under subsection (b)(4), its conclusion that railroad competitors were not the proper comparison class has no precedential value. In any event, as shown above, the more recent sales and use tax cases uniformly have declined to follow the Ninth Circuit's approach to the comparison class issue. In addition, no court in the Ninth Circuit has applied or cited *Atchison Topeka* in the 17 years since it was decided.

3. No doubt recognizing that its claim of a circuit split is doomed by the lower courts' express rejection of categorical rules on the comparison class issue, Alabama contends that the Eleventh Circuit – and presumably several other courts – have violated principles of statutory construction by finding that different comparison classes are appropriate in different subsection (b)(4) cases. See Pet. 13-14, 20-21 (asserting that the Eleventh Circuit's reasoning "was flatly inconsistent with the courts' obligation to main-

tain the consistent meaning of words in statutory text") (internal quotation marks omitted). This argument really goes to the merits, not whether the petition should be granted, since it is just another form of Alabama's contention that the Eleventh Circuit's decision is "wrong" because the sole or exclusive comparison class permitted by subsection (b)(4) is all commercial and industrial taxpayers. *Id.* at 19-22.

Space constraints preclude a full presentation on the merits, but what is fundamental for purposes of certiorari is that the Eleventh Circuit's standard is fully consistent with established principles of statutory construction. Subsection (b)(4) broadly prohibits "discriminat[ion]," a term that the 4-R Act does not define but that encompasses conduct that can take many forms. Subsection (b)(4) also does not specify a comparison class, even though "Congress demonstrated that it knew how to provide for a specific comparison class when it wanted one as demonstrated by the three property tax provisions." *Lohman*, 193 F.3d at 985. Under these circumstances, the Eleventh Circuit hardly violated any textual limitation in holding that subsection (b)(4) does not direct the use of a single comparison class. Indeed, even courts that have used the broader comparison class (all comercial and industrial taxpayers) have expressly disavowed the notion that this comparison is the *only* one permitted by subsection (b)(4). *Koeller*, 653 F.3d at 509 (citing *Lohman*). Accordingly, Alabama's effort to manufacture a circuit split fails.

II. THIS CASE DOES NOT IN ANY EVENT PRESENT AN APPROPRIATE VEHICLE FOR REVIEW.

Even if there were a circuit conflict on the proper comparison class for resolving subsection (b)(4) claims, this case is not an appropriate vehicle for

reaching it. Alabama conceded at every stage of the proceedings below that competitors were the proper comparison class for resolving this case, and litigated this case by drawing that very comparison. It therefore waived any argument that use of this comparison class was "wrong," see Pet. 19-22, and this Court should not review that issue. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (declining to reach issue that "was not raised below" and, therefore, "waived"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (same); see also *Freytag* v. *Comm'r*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (parties cannot "suggest[] or permit[], for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claim[] that the course followed was reversible error").

As Alabama acknowledges, both the district court and the court of appeals held that the State agreed that competitors were the proper comparison class for resolving this case. The district court – which received briefing from the parties and presided over the bench trial – found this twice in its opinion. Pet. App. 45a ("it appears both parties agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act"); *id.* at 51a ("the parties here agree on a different class for comparison purposes – the competitive mode class, not the 'all other commercial and industrial taxpayers' class"). The court of appeals – which received briefing and heard oral argument – likewise found this twice in its opinion. *Id.* at 8a ("In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers."); *id.* at 11a ("CSX and the State stipulated, and the district court agreed, that the proper comparison class for this case

was CSX's competitors"). Indeed, as noted, the court of appeals expressly relied upon Alabama's concession on the proper comparison class as one of its rationales for using that comparison class in this case. *Id.* at 11a.

Alabama contends that the district court and court of appeals judges who heard this case – all four of them – were "mistaken" and "wrong" about what it argued. Pet. 15-17. But the record, including the very submissions that Alabama relies upon, belies this contention. In the district court, Alabama consistently asserted that competitors were the proper comparison class, and litigated its case by making that comparison. For example, Alabama points to references in its post-trial briefs to the proposed test that Justice Thomas articulated in his dissent in *CSXT II*, 131 S. Ct. at 1120, which would "prohibit[] taxes that target or single out railroads as compared to general commercial and industrial taxpayers." See Pet. 17 (quoting Pet. App. 71a-72a, 89a). In both instances, however, Alabama fails to quote the sentences surrounding these references, in which the State articulated its view that "targeting/singling out" is the correct test, *but that competitors are the correct comparison for making that determination.* See, *e.g.*, Pet. App. 72a ("In order to determine if the Department has targeted or singled out railroads for discrimination, the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to both the railroads and their competitors must be analyzed*") (emphasis added); *id.* at 89a-90a ("The only way to determine if the Department has targeted or singled out railroads for discrimination, is to look at the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to both the railroads and*

their competitors") (emphasis added). Consistent with this standard, the remainder of Alabama's post-trial briefs focus on comparing the fuel taxes imposed upon CSXT and its competitors. *Id.* at.72a-81a; *id.* at 90a-92a. Of course, Alabama lost that issue below and has chosen not to seek this Court's review of the question actually decided by the lower courts, viz., whether the disparate treatment of the railroads and their competitors constituted actionable discrimination in violation of subsection (b)(4).

Alabama's other pleadings and advocacy in the district court consistently identified and employed competitors as the comparison class. For example, Alabama's pre-trial brief similarly referenced Justice Thomas' "targeting/singling out" test, and then stated that in order to apply that test, the tax structure "as compared to both the railroads and their competitors must be analyzed." Defendants' Response to Plaintiff's Pretrial Brief, at 5 (Apr. 12, 2012) (Dkt. 62); *id.* at 6 (taxes "paid on the purchase and consumption of diesel fuel by the railroads and their competitors" must be analyzed). In addition, Alabama asserted the following in its opening statement at trial: "[T]o make the comparison as to whether the department is indeed discriminating, it must be looked at, the taxes paid by other motor carriers who I don't think CSX would disagree is their major competitor, and the sales taxes paid by CSX." Trial Tr. at 12 (Apr. 25, 2012) (Dkt. 65). Alabama then stated – as it notes in the petition, Pet. 17 – that it agreed that Justice Thomas "got the standard" as to "whether the state has singled out the railroad for discrimination," but Alabama did not make any mention of the broader comparison class that Justice Thomas identified. Trial Tr. at 12. And again, the entire focus of Alabama's pre-trial brief and its trial presentation

was to compare Alabama's tax treatment of CSXT and its transportation competitors. Accordingly, the district court's findings that Alabama agreed that competitors are the proper comparison class were fully supported by Alabama's pleadings and other aspects of the record.[6]

The Eleventh Circuit's identical findings are also fully supported by the record. As an initial matter, despite its assertion in the petition that the district court erred in finding that the State conceded the comparison class issue, Pet. 16-17, Alabama never challenged or contested the district court's finding on appeal. To the contrary, Alabama affirmatively argued in its appeal brief that competitors were the proper comparison class and that it had conceded this in the district court. See, *e.g.*, Br. of Appellees at 19, *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, No. 12-14611 (11th Cir. Nov. 13, 2012) ("Alabama 11th Circuit Br.") (the court must determine a comparison class and "[h]ere, this means considering the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) *as compared to railroads and their competitors*) (emphasis added); *id.* at 27 (relevant comparison is taxes paid on diesel fuel "by the railroads and their competitors"); *id.* at 23

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[6] At the very least, any error on the part of the district court in construing Alabama's position on the comparison class issue was caused by the confusing nature of Alabama's pleadings – which referenced Justice Thomas' test, but then articulated it in a way that uses competitors as the relevant comparison class. This Court typically does not come to the aid of parties who invite the errors of which they complain. *See City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted in part because "there would be considerable prudential objection to reversing a judgment because of [jury] instructions that petitioner accepted, and indeed itself requested").

(distinguishing *McNamara*'s use of the broader class consisting of all commercial and industrial taxpayers "[b]ecause the parties agreed on a much smaller class below"). Accordingly, the Eleventh Circuit's findings that Alabama conceded the comparison class issue were hardly "mistaken" or "wrong." See Pet. 16. Those findings were compelled by Alabama's own representations to the court.[7]

The record is clear that Alabama consistently conceded below that competitors are the proper comparison class, and therefore waived any argument to the contrary. For this reason, the petition is not an appropriate vehicle for addressing the question that Alabama raises.

III. THE DECISION BELOW DOES NOT RAISE A QUESTION OF EXCEPTIONAL IMPORTANCE.

Alabama and its *amici* attempt to characterize the tax issue presented in this case as one of nationwide significance, but their efforts are unavailing. See Pet. 4 ("many other States offer similar exemptions"); Br. of *Amicus Curiae* Multistate Tax Commission, at 9-11 (asserting that the tax regime at issue "is common throughout the states" and that "[t]he potential economic impact to the states" of the court of appeals' ruling below is "enormous"); Br. for American Trucking Associations, Inc., at 7-8. As an initial matter, the

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[7] Alabama notes that in its appeal brief, it briefly asserted Justice Thomas' test and the broader comparison class as an alternative ground for affirming the district court's ruling. Pet. 18 (citing Alabama 11th Cir. Br. at 36-37). This alternative argument does not save Alabama from its waiver problem. Alabama consistently conceded below the propriety of using competitors as the comparison class and therefore waived the argument it seeks to put before this Court – that use of that comparison class was error.

fact that no other State has filed a brief in support of the petition speaks volumes and belies any argument that the States as a whole, or even particular States, have a substantial interest in this dispute between CSXT and Alabama. In addition, the participation of American Trucking Associations (ATA) makes plain that the true stakes here concern the competitive landscape of the transportation industry.[8]

The silence of the States hardly is surprising because – contrary to the assertions of Alabama and its *amici* – Alabama's taxing scheme is not common and very few States would be affected by the issue presented here. Unlike Alabama, most States that have sales and use taxes exempt diesel fuel used by railroads. Of the 23 jurisdictions (including the District of Columbia) in which CSXT operates, only six impose any sales and use tax on railroad diesel fuel. Several of these jurisdictions that do impose their sales and use taxes on fuel used by railroads, such as New York and Illinois, similarly impose these taxes on fuel used for highway purposes. Accordingly, only a handful of States continue to impose a sales and use tax on railroad diesel fuel while exempting motor carriers. The petition therefore does not present a recurring issue that has nationwide significance.[9]

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[8] ATA's assertion that the decision below "results in a serious competitive disadvantage to motor carriers operating in Alabama," ATA Br. at 3, ignores that the Alabama legislature is free to revise its tax scheme to comply with the 4-R Act.

[9] MTC asserts (at 11) that the potential revenue loss to the States of the decision below is $83.6 million annually with respect to CSXT, but this is demonstrably wrong. MTC assumes that the States in which CSXT operates "apply a use tax at an average 5% rate" on its diesel fuel, *id.*, but as shown, most of

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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December 16, 2013

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those States do not impose *any* sales or use tax on railroad diesel fuel.

REPLY BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

As Justices Thomas and Ginbsurg put it when this case previously was before this Court, "[t]he lower courts have split over the proper scope of the comparison class." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1118 n.3 (2011) (Thomas, J., dissenting). On this point and all the others, CSX is burying its head in the sand.

A. The lower courts are divided on the question presented.

Justices Thomas and Ginsburg are not the only ones who have perceived a lower-court split on this question. Here is what Judge Wood said for a unanimous Seventh Circuit, two years ago: "The proper approach toward defining the appropriate class for comparison under subsection (b)(4) has divided the circuits, and the Supreme Court's most recent decision in this area, *CSX Transportation,* declined to resolve the split." *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (CA7 2011). The Eleventh Circuit in this very case acknowledged that "[a]mong our sister circuits there are essentially two camps: the functional approach and the competitive approach." Pet. App. 7a-8a. And in a 1999 decision adopting CSX's proposed rule, the Eighth Circuit effectively acknowledged that it was parting ways with the Ninth Circuit. *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984, 986 (CA8 1999) (citing *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, 446 (CA9 1996) (Nielsen, J., dissenting)).

CSX presumably believes that all these jurists were simply mistaken about the current status of lower-court jurisprudence. These decisions are con-

sistent with each other, the railroad says, because they involved different kinds of taxes. *See* BIO 8-18. In other words, the word "discriminates" in the 4-R Act can mean one thing—disparate treatment by comparison to competitors—in the context of one tax, yet mean another thing—disparate treatment by comparison to a more general class of taxpayers—when a different tax is at issue.

The certiorari petition explains why that argument makes no sense. *See* Pet. 13-14 (citing *United States v. Santos*, 553 U.S. 507, 522-23 (20[illegible]) (plurality opinion); *Clark v. Martinez*, 543 U.S. 371, 382 (2005)). As this Court has held, lower courts must ascribe meaning to a statute's language in a coherent way, lest the statute become a "chameleon." *Clark*, 543 U.S. at 382. And chameleonic statutes create unacceptable instability for everyone involved. If CSX is right, for example, consider what a state or local legislature is supposed to do when someone proposes a new tax exemption for a railroad competitor. Does that tax "discriminate" in violation of the 4-R Act? Under CSX's view, the legislature cannot know the answer until the federal courts announce which comparison class happens to apply to the new tax.

That cannot be what Congress had in mind, and no judge outside the Eleventh Circuit has held that the statute could work that way. The rule Justices Thomas and Ginsburg proposed, for example, categorically holds that the word "discriminates" refers only to tax-exemption schemes that "target or single out railroads by comparison to general commercial and industrial taxpayers." *CSX Transp.*, 131 S. Ct. at 1115 (Thomas, J., dissenting). In the other recent

appellate decision on the matter, the Seventh Circuit adopted a bright-line rule "endors[ing] reference to other commercial and industrial users" when reading the word "discriminates," "rather than an ill-defined 'all the circumstances' type of test." *Koeller*, 653 F.3d at 509;* *see also* Pet. App. 11a n.4 (Eleventh Circuit majority opinion acknowledges that the Seventh Circuit's decision "established a bright-line rule"). And, as CSX effectively acknowledges, the Ninth Circuit's rule from *Atchison, Topeka & Santa Fe Ry. v. Arizona*, 78 F.3d 438, does not change when the factual context does. *Cf.* BIO 17 (contesting the conflict as to that decision only by asserting, erroneously, that the Ninth Circuit's decision is no longer good law).

To be sure, the Eleventh Circuit did say it was reserving the right to make the statute a chameleon in some future case. *See* Pet. App. 11a-12a n.4. But the eyebrow-raising nature of that reservation just bolsters the already compelling case for certiorari. Professor Llewellyn, in compiling his exhaustive list of

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* CSX is misreading *Koeller* when it asserts that the Seventh Circuit held that "the choice of the proper comparison class is a case-specific inquiry." BIO 16. The Seventh Circuit categorically held that "the appropriate comparison class for subsection (b)(4)" is "the functional, middle group of all other commercial and industrial taxpayers." *Koeller*, 653 F.3d at 509. The court said it would opt for a different comparison class only under the unlikely hypothetical in which "rail carriers in a later case so dominate the economy that the group of all commercial and industrial taxpayers would overlap almost entirely with that of railroads." *Id.* at 509. The court did not say that it would deviate from the comparison class merely because a different tax was at issue.

dueling interpretive canons, did not see fit to include one calling for courts to read the same word, in the same statute, differently in different factual contexts. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). The Eleventh Circuit's reasoning on this point is so untenable that even CSX has distanced itself from it—claiming, implausibly, that the Eleventh Circuit did not actually adopt that reasoning. *See* BIO 18. Yet the Eleventh Circuit's opinion speaks for itself. Its reliance on this proposition makes the need for this Court's intervention imperative.

B. This case is the right vehicle for resolving the split.

CSX has no valid vehicle-based objection to review. CSX does not try to defend the result the Eleventh Circuit reached, and the amici have explained why the result is wrong. *See* Brief of *Amicus Curiae* Am. Trucking Assoc. 8-14; Brief of *Amicus Curiae* Multistate Tax Commission 11-17. With millions at stake for state and local governments, the right time for review is now.

CSX's baseless assertion of waiver need not detain this Court for long. The State has already explained why CSX is mischaracterizing the contentions the parties made when they were before the trial court. *See* Pet. 15-18. But even if CSX's contrary reading of the trial-court materials were the only possible one, the railroad has glossed over the far more critical consideration: *The State won in the trial court*. Having done so, it was entitled, on appeal, to

urge the Eleventh Circuit to adopt any legal theory that would lead to affirmance. *See* Pet. 18 (citing *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982)). The State unambiguously followed that course here, telling the Eleventh Circuit that if it disagreed with the trial court's ruling for the State under the narrower comparison class, the Court should affirm on the alternative basis that, as the State wrote, "'complaints such as CSX's should be dismissed for failing to state a "discriminat[ion]" claim under §11501(b)(4) when they do not allege that railroads are targeted or singled out compared to commercial and industrial taxpayers generally.'" Ala. 11th Cir. Br. 37 (quoting *CSX Transp.*, 131 S. Ct. at 1118 (Thomas, J., dissenting)).

CSX defies credibility when it asserts that the State did not adequately preserve this point on appeal. *See* BIO 22-23 (citing Ala. 11th Cir. Br. 19, 23, 27). In so doing, CSX is selectively quoting portions of the State's brief that set out its argument for affirmance under the trial court's rationale. CSX is not quoting those portions of the State's brief that put forth the alternative theory endorsed by Justices Thomas and Ginsburg. *See* Ala. 11th Cir. Br. 36-37. The State unambiguously made this argument, and the Eleventh Circuit did not say otherwise. Indeed, it was precisely because the State had made this argument that the court had no choice but to address it. *See* Pet. App. 7a-12a.

This case therefore presents fully "developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The panel's opinion binds every state and local government within

the Eleventh Circuit. CSX's cry of waiver cannot insulate the Eleventh Circuit's important and erroneous opinion from review.

C. This case is important.

CSX is blinking reality throughout its opposition, and nowhere is this more apparent than in its claim that this question is somehow unimportant. *See* BIO 23-24. Exhibit A on this front, the railroad says, is "the fact that no other State has filed a brief in support of the petition." *Id.* at 24. The very name of one amicus, the Multistate Tax Commission, speaks volumes to the contrary. *See* Brief of *Amicus Curiae* Multistate Tax Comm'n Br. 9-11. So, too, does the Commission's representation that its members include "forty-seven states and the District of Columbia." *Id.* at 1. The plethora of decisions that gave rise to this 3-2 circuit split further undermines CSX's contention that "very few States would be affected by the issue presented." BIO 24. And it is telling that CSX has failed to support its claim of practical insignificance with even a single citation to a legal authority. CSX instead relies exclusively on undocumented and unverifiable representations about its own experience in the particular States where it does business. *See* BIO 24.

CSX's own litigation maneuvers show that it knows that this issue is, in reality, of tremendous significance to governments and taxpayers alike. CSX thought that these taxes were of sufficient importance to ask this Court to grant review in this very case four years ago. *See* Pet. for Writ of Cert., *CSX Transp., Inc. v. Ala. Dep't of Revenue,* No. 09-520, 2009 WL 3550821, at *10 (Oct. 28, 2009). The

United States thought that these taxes were sufficiently important to support CSX's petition. *See* Brief *Amicus Curiae* of the United States, No. 09-520, *CSX Transp. v. Ala. Dep't of Revenue*, 2010 WL 1954258, at *11-*17 (May 14, 2010). And this Court thought these taxes sufficiently important to warrant review. This Court should take the same action now.

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December 30, 2013

AMICUS CURIAE BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. 11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors.

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In the Supreme Court of the United States

No. 13-553

ALABAMA DEPARTMENT OF REVENUE, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied. If the Court grants the petition, however, the United States respectfully requests that the Court add the following question:

> Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976

(4-R Act), Pub. L. No. 94-210, 90 Stat. 31, to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." § 101(a), 90 Stat. 33; see *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1105 (2011) (*CSX*); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

The 4-R Act targets discriminatory state taxation as a particular cause of decline in the rail industry. See § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007) (*Georgia State Bd.*).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). To protect those important channels of interstate commerce, Congress created an exception to the Tax Injunction Act, 28 U.S.C. 1341, that authorizes federal courts to enjoin

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[1] Section 306 of the 4-R Act, 90 Stat. 54, has been repeatedly recodified and rephrased without substantive change. It was originally codified at 49 U.S.C. 26c (1976). It was then recodified in 1978, with a slight change in language, at 49 U.S.C. 11503 (1994) as part of the enactment into positive law of Title 49. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. That restatement of prior law was "without substantive change." § 3(a), 92 Stat. 1466; see *Burlington N. R.R.*, 481 U.S. at 457 n.1. In 1995, the provisions of Section 11503 were again reenacted without substantive change but renumbered as Section 11501, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission (ICC) and created the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. Accordingly, this brief refers throughout to the current codification of Section 306 at 49 U.S.C. 11501. See Sup. Ct. R. 34.5.

prohibited forms of state taxation. 49 U.S.C. 11501(c); see *CSX*, 131 S. Ct. at 1105.

Section 11501(b) defines several types of prohibited taxation. Subsections (b)(1)-(3) bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property relative to "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3). Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *Georgia State Bd.*, 552 U.S. at 16, 18 (referring to "objective benchmark[s]" underlying "the comparison of ratios the statute requires" in Subsection (b)(1)); *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as "untenable" the view that a claim under Subsection (b)(1) requires proof of intentional discrimination). A separate catch-all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States from imposing "another tax that discriminates against a rail carrier." That is the provision at issue here.

2. Alabama imposes four-percent sales and use taxes on the retail sale, storage, use, or consumption in Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (LexisNexis 2011) (sales tax); *id.* § 40-23-61(a) (use tax). Although the sales and use taxes are generally applicable, state law exempts fuel for use by vessels engaged in interstate or foreign commerce. *Id.* §§ 40-23-4(a)(10) (exemption from sales tax), 40-23-62(12) (exemption from use tax). Water carriers engaged in interstate or foreign commerce therefore typically do not pay tax to Alabama on their motor fuel.

Alabama also imposes primary and additional excise taxes totaling 19 cents per gallon on the receipt of

motor fuel, including diesel fuel. Ala. Code § 40-17-325(a)(2) (LexisNexis 2011).[2] Motor fuel subject to the primary excise tax is exempt from the sales and use taxes. *Id.* § 40-17-325(b). On-road motor carriers therefore typically pay an excise tax of 19 cents per gallon of fuel to Alabama, and they do not pay a sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama's motor-fuel excise taxes. That is because dyed diesel fuel—which is what locomotives burn—is exempt from Alabama's motor-fuel excise taxes. Ala. Code § 40-17-329(a)(3) (Supp. 2013). Railroads (along with other off-road diesel users and intrastate water carriers covered by similar excise-tax exemptions) therefore typically pay sales and use taxes of four percent to the State, and they do not pay an excise tax on their fuel.[3]

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[2] At the time of the district court's decision in this case, the fuel excise taxes were codified at Ala. Code § 40-17-2 (LexisNexis 2011). In October 2012, Alabama enacted the Alabama Terminal Excise Tax Act, No. 2011-565, § 45, 2011 Ala. Laws Reg. Sess. 1141-1142, which modified the motor-fuel tax scheme and, *inter alia*, repealed that section. The modifications are not material here. See Pet. App. 3a n.2.

[3] The foregoing describes only the state-level tax scheme. Certain subdivisions of Alabama are also authorized to levy and collect taxes. See, *e.g.*, Ala. Code § 11-3-11(a)(2) (LexisNexis 2008) (powers of county commissions include levying taxes), *id.* § 11-3-11.2 (powers of county commissions include collecting local taxes), *id.* § 11-51-200 (powers of municipal corporations include levying taxes). Pursuant to that authority, several Alabama counties and municipalities impose additional sales and use taxes on dyed diesel fuel, see Pet. App. 35a-36a, as well as additional excise taxes on undyed diesel fuel, *id.* at 57a. In addition, federal motor-fuel taxes are collected on on-road diesel fuel, but not on off-road dyed diesel,

3. Respondent, a rail carrier providing transportation subject to the jurisdiction of the Surface Transportation Board, sued petitioners Alabama Department of Revenue and its Commissioner in federal district court under the 4-R Act. Respondent contended that, by requiring rail carriers to pay sales and use taxes from which motor carriers and interstate and foreign water carriers are exempt, petitioners had discriminated against respondent in violation of 49 U.S.C. 11501(b)(4).

a. The district court dismissed respondent's suit, and the court of appeals affirmed. 350 Fed. Appx. 318. Both courts relied on an earlier Eleventh Circuit decision holding that rail carriers could not invoke Section 11501(b)(4) to challenge a generally applicable tax on the ground that other entities were exempt from the tax. *Id.* at 319-320; see *Norfolk S. Ry.* v. *Alabama Dep't of Revenue*, 550 F.3d 1306 (11th Cir. 2008).

b. The Court granted respondent's petition for a writ of certiorari, limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as 'another tax that discriminates against a rail carrier.'" 560 U.S. 964. After briefing and argument, the Court answered that threshold question in the affirmative. *CSX*, 131 S. Ct. 1101.

i. The Court first held that the term "another tax" in Section 11501(b)(4) refers to "any form of tax a State might impose, on any asset or transaction, except the taxes on property previously addressed in

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such as that used by railroads. See 26 U.S.C. 4081, 4082; 26 C.F.R. 48.4082-1.

subsections (b)(1)-(3)." *CSX*, 131 S. Ct. at 1107. Accordingly, "[a]n excise tax, like Alabama's sales and use tax, is 'another tax' under subsection (b)(4)." *Ibid.* The Court then held that "'[d]iscrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored,'" *id.* at 1108 (quoting *Black's Law Dictionary* 534 (9th ed. 2009) (*Black's*)), and that a tax with an exemption "discriminate[s]" if the exempt and non-exempt "groups are similarly situated and there is no justification for the difference in treatment," *id.* at 1109 & n.8. In so holding, the Court declined to "limit the prohibited discrimination to state tax schemes that unjustifiably exempt local actors, as opposed to interstate entities" because, "[c]onsistent with the Act's purpose of restoring the financial stability of railroads (not of interstate carriers generally)," the 4-R Act distinguishes "between railroads and other actors, whether interstate or local." *Id.* at 1109.

The Court declined, however, to "consider any issues concerning whether [the challenged Alabama] exemptions actually discriminate against" respondent. *CSX*, 131 S. Ct. at 1107 n.5; see *id.* at 1109 n.8, 1114. In particular, the Court declined to address (i) whether a "court must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well," and (ii) whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." *Id.* at 1107 n.5. The Court left "these and all other issues relating to whether Alabama actually has discriminated against [respondent] to the trial court." *Ibid.*

ii. Justice Thomas, joined by Justice Ginsburg, dissented. *CSX*, 131 S. Ct. at 1114-1120. The dissenting Justices agreed with the Court's resolution of the threshold question, but they would have further held that "a tax exemption scheme" violates Section 11501(b)(4) only if it "target[s] or single[s] out railroads by comparison to general commercial and industrial taxpayers." *Id.* at 1115.

4. On remand, the district court found "no discrimination under the 4-R Act." Pet. App. 30a-66a. The court defined the appropriate comparison class as the rail carrier's "competing transportation modes" (*i.e.*, motor carriers and water carriers), after noting that "both parties" had "agree[d]" that the "'competing mode' comparison is appropriate." *Id.* at 44a-45a; see *id.* at 51a ("the parties here agree" on a "competitive mode class"). The court then examined "whether [petitioners] adequately justifie[d] the sales and use tax exemptions for the rail carrier's principal competitors." *Id.* at 54a.

The State had pointed to the "separate tax on the fuel used by motor carriers" to "justify the sales and use tax 'exemption' provided to motor carriers." Pet. App. 55a-56a. The district court found that "justification sufficient" because "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a. Looking exclusively at state taxes, the court found that "motor carriers actually pay a higher rate" and that, "when factoring [in] the local (city and county) sales and use taxes imposed on rail carriers'[] diesel fuel," they "paid similar rates per gallon of diesel fuel from January 2007 through December 2009." *Id.* at 56a-57a. The court further noted that "these calculations fail to

account for the local excise taxes imposed on motor carriers per gallon purchased of undyed diesel fuel." *Id.* at 57a.

With respect to the claim of disparate treatment vis-à-vis water carriers, the district court found no "discriminat[ion]" for "two reasons." Pet. App. 63a. First, respondent offered "no evidence regarding the purported discriminatory effect as it relates to" interstate (as opposed to intrastate) water carriers. *Id.* at 64a. Second, the possibility that the exemption for water carriers may have been needed to avoid "commerce clause scrutiny" meant that rail carriers are not "the same in all relevant respects." *Ibid.* (quoting *CSX*, 131 S. Ct. at 1108).

5. The court of appeals reversed and remanded. Pet. App. 1a-17a.

a. The court of appeals addressed a "first-order question that the Court left untouched" in *CSX*: "against what do we compare the railroads?" Pet. App. 7a. The court noted that "the question of the proper comparison class ha[d] not been the central inquiry of this appeal," and that "the district court and the parties [had] adopted the competitive approach" in the proceedings below. *Id.* at 8a. The court nevertheless felt "obliged to say a few words" about the matter. *Ibid.* It ultimately concluded that, "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" the 4-R Act's "goal" of "ensuring 'financial stability' for rail carriers." *Id.* at 11a. The court then noted (again) that the parties had "stipulated, and the district court [had] agreed, that the proper comparison class for this case was [respondent's] competitors." *Ibid.* In so holding, the court made clear that "the comparison class should be ap-

propriate to the type of tax and discrimination challenged in a particular case," *id.* at 12a n.4 (quoting *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000)), and that a comparison class of "all commercial and industrial taxpayers" may "be appropriate in certain situations," *id.* at 11a n.3.

The court of appeals further held that the challenged tax was discriminatory. Pet. App. 12a-17a. The court concluded that respondent had "established a prima facie case of discrimination" because its "competitors do not pay the State's sales tax." *Id.* at 12a. Turning to petitioners' justification for the disparate treatment, the court declined to examine "all the taxes paid on diesel-fuel purchases" and instead "'look[ed] only at the sales and use tax with respect to fuel to see if discrimination has occurred.'" *Id.* at 12a-13a (quoting *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) (*UPRR*)). The court stated that a broader inquiry would impose the "Sisyphean burden of evaluating the fairness of the State's overall tax structure." *Id.* at 16a.

b. Judge Cox dissented. Pet. App. 18a-29a. He "agree[d] that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. Judge Cox disagreed, however, with the court's conclusion "that a tax exemption for interstate motor carriers discriminates against interstate rail carriers when motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Ibid.*

DISCUSSION

The two issues that the Court left open in *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 n.5 (2011), are both critical to determining

whether a tax "discriminates against a rail carrier" in violation of 49 U.S.C. 11501(b)(4). The first issue concerns the definition of an appropriate comparison class; the second is whether other aspects of the State's tax scheme can justify the challenged tax's disparate treatment of rail carriers. The court of appeals correctly held that a railroad's direct competitors can constitute an appropriate comparison class. The court erred, however, in finding the challenged tax discriminatory without considering alternative and comparable taxes that could have justified the disparate treatment.

Whether those issues would warrant this Court's review in an appropriate case is a close question. There is some tension among the courts of appeals with respect to the comparison-class issue, but the conflict asserted by petitioners is substantially overstated. There is also no square conflict on the second issue (*i.e.*, whether other aspects of the State's tax scheme are relevant to the discrimination inquiry), but the courts of appeals that have squarely addressed the question have reached the wrong conclusion. And while the issues are potentially significant, it is not clear whether they have substantial nationwide import.

In any event, this case is not an appropriate vehicle for resolving those issues. The petition presents only the comparison-class question, and that issue was not actively contested below. The issue of alternative and complementary taxes was fully litigated below, but petitioners have abandoned the argument in this Court. If the Court finds it appropriate to clarify the discrimination inquiry under Section 11501(b)(4), it should do so in a case that cleanly presents both ques-

tions. Because this is not such a case, the petition for a writ of certiorari should be denied. In the alternative, the Court should add a second question presented as set forth above.

A. The Court Of Appeals' Decision Is Correct In Some Respects And Flawed In Others

In *CSX*, the Court declined to decide (i) whether a "court must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well," and (ii) whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." 131 S. Ct. at 1107 n.5. The courts below addressed those questions on remand. On the first issue, the court of appeals held that the comparison class may vary depending on the type of discrimination alleged and that, in this case, a comparison class consisting of the rail carrier's direct competitors was appropriate. Pet. App. 7a-12a. On the second issue, the court held that a State cannot justify disparate tax treatment of rail carriers by pointing to alternative and complementary taxes imposed on competitors but not on rail carriers. *Id.* at 12a-16a. The court correctly resolved the first issue, but not the second.

1. Petitioners contend (Pet. 19-22) that "commercial and industrial taxpayers generally" are the only comparison class that can properly be used to determine whether particular state taxes violate Section 11501(b)(4). That approach is inconsistent with the statute's text and structure, and it would not fully effectuate Congress's purpose.

Section 11501(b)(4) bars States and localities from imposing any tax that "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). A tax "discriminates"

when it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (quoting *Black's* 534). A tax that "targets or singles out railroads as compared to other commercial and industrial taxpayers" is indisputably a form of discrimination under Section 11501(b)(4). *Id.* at 1115 (Thomas, J., dissenting); see *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). But it is not the only form. A tax may "discriminate[] against a rail carrier" (49 U.S.C. 11501(b)(4)) if it applies generally to commercial and industrial taxpayers (including railroads), but not to rail carriers' direct competitors. See Pet. App. 7a-12a. If the two groups are "similarly situated" and there is "no justification for the difference in treatment," a court cannot "say that such a tax" does not "discriminate" without "adopt[ing] a definition of [discrimination] at odds with its natural meaning." *CSX*, 131 S. Ct. at 1109.

The structure of the antidiscrimination provision reinforces that ordinary meaning. Subsections (b)(1)-(3) of 49 U.S.C. 11501 identify one (and only one) comparison class: "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3). Subsection (b)(4), by contrast, does not specify any comparison class; it broadly prohibits state and local taxes that "discriminate[] against a rail carrier." 49 U.S.C. 11501(b)(4); see *CSX*, 131 S. Ct. at 1114 (Section 11501(b)(4) does not contain "any of the prior subsections' limitations."). That Congress included a specific comparison class for Subsections (b)(1)-(3) but not for Subsection (b)(4) strongly suggests that the omission was

intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[4]

In enacting the 4-R Act, Congress was clearly concerned that railroads "are easy prey for State and local tax assessors" because they are "'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *CSX*, 131 S. Ct. at 1117 (Thomas, J., dissenting) (citation omitted). "[L]inking the taxation of railroads to the taxation of businesses with local political influence" addresses that concern. *Ibid.* Congress also sought, however, to "restor[e] the financial stability of railroads (not of interstate carriers generally)," *id.* at 1109; see 4-R Act § 101(a), 90 Stat. 33, and to "foster competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33. Linking the taxation of railroads to the taxation of other carriers and modes of transportation would further that purpose.

The court of appeals thus correctly held that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," Pet. App. 12a n.4 (quoting *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000)), and that "the ap-

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[4] That does not mean that prohibited discrimination under Section 11501(b)(4) occurs whenever any person is treated more favorably for state-tax purposes than is a rail carrier. If "a railroad challenged a scheme in which 'every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt,' for some reason having nothing to do with railroads," the suit "would be promptly dismissed." *CSX*, 131 S. Ct. at 1110 (quoting *id.* at 1119 (Thomas, J., dissenting)).

propriate comparison class" in this case was respondent's "competitors," *id.* at 11a-12a.

2. The court of appeals also addressed whether a State could justify the disparate treatment of rail carriers by pointing to other aspects of the State's tax scheme, or whether the court could consider only the specific taxes challenged. The court held that only the challenged taxes are relevant. Pet. App. 12a-16a. The dissenting judge and the district court concluded that alternative, complementary taxes may be considered as well. *Id.* at 20a-28a (Cox, J., dissenting), 46a-62a. Those judges have the better of that argument.

Section 11501(b)(4) prohibits discrimination. Economic "discrimination" does not exist simply because two classes are treated differently. A state tax that treats a rail carrier differently than a similarly-situated taxpayer "discriminates against a rail carrier" (49 U.S.C. 11501(b)(4)) only if the State cannot justify the differences in treatment. See *CSX*, 131 S. Ct. at 1109 & n.8. As the United States has previously explained, one way a State can justify differential treatment is by showing that entities within the comparison class are subject to alternative and comparable state or local taxes that are not levied against railroads. See Gov't Merits Amicus Br. at 26 n.8, *CSX*, *supra* (No. 09-520); Gov't Pet. Stage Amicus Br. at 17 & n.8, *CSX*, *supra* (No. 09-520); Gov't Merits Amicus Br. at 21-22, *Department of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332 (1994) (No. 92-74).

The court below truncated the discrimination analysis because it perceived a broader inquiry to be unduly difficult. Pet. App. 13a-16a. But the Court recognized in *CSX* that "[d]iscrimination cases sometimes do raise knotty questions," and that such difficulties

are no reason to "flout the congressional command." 131 S. Ct. at 1114. Petitioners did not ask the court below to examine the State's entire tax structure. Rather, they sought to justify the differential treatment of rail carriers and motor carriers under the sales and use taxes by pointing to a single, alternative tax on the same taxable item (*i.e.*, diesel fuel). See Pet. App. 24a-26a (Cox, J., dissenting). The district court had engaged in precisely that inquiry without undue burden or expense, see *id.* at 55a-62a, and it found that "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same," *id.* at 56a—a finding that respondent did not challenge on appeal, *id.* at 21a (Cox, J., dissenting). In those circumstances, the court of appeals' exclusive focus on the sales and use taxes had the potential to produce a "bizarre" result (*id.* at 25a (Cox, J., dissenting)) that exalted form over substance.

B. Whether The Issues Would Warrant The Court's Review In An Appropriate Case Is A Close Question

The question whether these issues (left open by the Court in *CSX*) would warrant the Court's review in an appropriate case is a close one.

1. Petitioners assert (Pet. 11-15) that there is an entrenched conflict among the lower courts as to the proper comparison class for Section 11501(b)(4) claims. The *CSX* dissent similarly observed that "lower courts have split over the proper scope of the comparison class." 131 S. Ct. at 1118 n.3 (Thomas, J., dissenting). And the courts of appeals have acknowledged some division among the circuits. See Pet. App. 7a-8a; *Kansas City S. Ry.* v. *Koeller*, 653 F.3d 496, 508 (7th Cir.), cert. denied, 132 S. Ct. 855 (2011). Alt-

hough there is some tension, the asserted conflict is considerably overstated.

Nearly all of the decisions cited by petitioners are consistent with the proposition that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." *Lohman*, 193 F.3d at 986. In cases where the rail carrier is subject to a general tax, but its competitors are not, rail carriers allege, and the courts generally adopt, a comparison class consisting of the rail carrier's competitors. See Pet. App. 7a-12a; *Lohman*, 193 F.3d at 985-986; *Burlington N. R.R.* v. *Commissioner of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993); see also *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, 969 F. Supp. 2d 895, 897-899 (M.D. Tenn. 2013); cf. *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007) (parties agreed to "competitive mode class"); *Kansas City S. Ry.* v. *Bridges*, No. 04-2547, 2007 WL 977552, at *7 (W.D. La. Mar. 30, 2007) (same). In cases where the rail carrier and a handful of other taxpayers are subject to a tax, but most commercial and industrial taxpayers are not, rail carriers allege, and the courts generally adopt, a comparison class of other commercial and industrial taxpayers. See *McNamara*, 817 F.2d at 374-376 (tax applied to public utilities including rail carriers' main competitors); *Koeller*, 653 F.3d at 500, 508-510 (higher tax applied to two railroads, four pipelines, and two utilities).

None of the decisions cited above adopted a categorical rule that there is one and only one proper comparison class for all cases brought under Section 11501(b)(4). Several courts have expressly disclaimed any such holding. See, *e.g.*, Pet. App. 11a n.3 (ac-

knowledging that an "all commercial and industrial taxpayer[]" comparison class "might be appropriate in certain situations"); *Lohman*, 193 F.3d at 985, 986 (holding that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," and that "a comparison class of competitors" is appropriate "[w]ith respect to the Missouri sales and use taxes at issue here"); *Burlington N. R.R.*, 509 N.W.2d at 553 (distinguishing cases that do not "deal[] with the situation where the railroad is subject to a general tax but its competitors are not"); cf. *Koeller*, 653 F.3d at 508-510 (noting that decision is not "incompatible" with *Lohman*, "endors-[ing] reference to other commercial and industrial users" "for now," and leaving other "hypothetical" cases "for another day"). Other courts simply did not reach the question whether a different comparison class might be proper in another case. See *McNamara*, 817 F.2d at 374-376.

The lone exception is *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, 78 F.3d 438 (9th Cir.) (*Atchison*), cert. denied, 519 U.S. 1029 (1996). The rail carrier in that case challenged sales and use taxes that applied generally to commercial and industrial taxpayers (including rail carriers), but that exempted motor carriers (who were subject to a different tax scheme). *Id.* at 439. In a split decision, the court held that "the proper comparison class to use in analyzing discriminatory taxation of the railroads under the 4-R Act is 'all other commercial and industrial taxpayers subject to the taxes,'" and that a "narrow comparison class, comprised only of 'motor carriers,'" could not be used. *Id.* at 441-442. Although that decision conflicts with the decision below, the split is by no means en-

trenched. *Atchison* has never been cited or relied on by any court in the Ninth Circuit. And the court did not have the benefit of this Court's decision in *CSX*, which expressly abrogated another aspect of the *Atchison* decision. 131 S. Ct. at 1106 n.4.

2. There is also no square conflict on the question whether a court should take into account alternative and complementary state taxes in determining whether the challenged tax is discriminatory. The Eighth Circuit, like the court below, has held that courts should look solely at the taxes that rail carriers are required to pay, and should find that unlawful discrimination has occurred if the rail carriers' competitors are exempt from those taxes, without regard to the remainder of the state taxing scheme. See *UPRR*, 507 F.3d at 695; *Lohman*, 193 F.3d at 986. No court of appeals has adopted a contrary approach. Accordingly, while there is no circuit conflict, the courts that have squarely decided the issue have (in the government's view) reached the wrong conclusion.

3. Both issues appear to be important and to have significance beyond the facts of this particular case. Petitioners suggest (Pet. 14) that they stand to lose "at least $5 million each year in revenues, and may face refund claims exceeding $10 million," as a result of the court of appeals' decision. And the parties agree that at least a "handful" of other States "impose a sales and use tax on railroad diesel fuel while exempting motor carriers." Br. in Opp. 24; see Pet. 14-15. Indeed, comparable taxing schemes in at least four other States have prompted litigation. See, *e.g.*, *Illinois Cent. R.R.*, 969 F. Supp. 2d at 893-894 (Tennessee); *Bridges*, 2007 WL 977552, at *1-*2 (Louisi-

ana); *UPRR*, 507 F.3d at 694 (Minnesota); *Lohman*, 193 F.3d at 984-985 (Missouri).

The precise scope of the prospective impact on other States, however, is unclear. The Multistate Tax Commission (MTC) notes that the large majority of States exempt fuel for highway use from general sales and use taxes. MTC Amicus Br. 10; see Am. Trucking Ass'ns, Inc. Amicus Br. 5, 7 ("most States exempt fuels subject to their motor fuels excise tax from sales tax"). But neither petitioners nor their amici have addressed whether rail carriers in those States are subject to sales and use taxes on diesel fuel, and respondent contends (Br. in Opp. 24) that "most States that have sales and use taxes exempt diesel fuel used by railroads."

C. This Case Is Not An Appropriate Vehicle For Clarifying The Discrimination Inquiry Under Section 11501(b)(4)

Even if this Court concludes that the questions discussed above warrant its review, it should clarify the discrimination inquiry under Section 11501(b)(4) in a case that cleanly presents both issues. Resolving one while leaving the other undecided would be an artificial and incomplete exercise. For that reason, this case is not a suitable vehicle for further review.

1. The petition for a writ of certiorari presents only the comparison-class question. See Pet. i. Respondent argues (Br. in Opp. 18-23) that petitioners have "waived" that issue. That argument has considerable support in the record.

In the initial proceedings, petitioners "conceded that * * * the comparison class consists of motor carriers and water carriers." Pet. App. at 12a, *CSX*, *supra* (No. 09-520); see Resp. Br. at 48 n.7, *CSX*, *su-*

pra (No. 09-520). This Court recognized that petitioners had potentially "waived" the issue, but left it to the district court to decide the waiver question in the first instance. *CSX*, 131 S. Ct. at 1107 n.5.

On remand, petitioners did not argue that they had preserved the comparison-class issue, and they did not withdraw their earlier concession. Petitioners made a passing mention of "other commercial taxpayers," Pet. App. 80a, 91a, and they cited the dissenting Justices' reference to "taxes that target or single out railroads as compared to general commercial and industrial taxpayers," *id.* at 70a-71a (quoting *CSX*, 131 S. Ct. at 1120); see 4/25/12 Bench Trial Tr. 12 (Dkt. No. 65). But petitioners never actually *pressed* the *CSX* dissenters' argument that other commercial and industrial taxpayers are the only appropriate comparison class. To the contrary, they told the district court that the "only way to determine if" the State "has targeted or singled out railroads for discrimination, is to look at the excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel) as compared to both the railroads and their competitors." Pet. App. 88a-89a; see *id.* at 71a. The district court thus understood "both parties" to "agree that rail carriers' 'competing transportation modes' constitute the proper comparison under the 4-R Act." *Id.* at 45a; see *id.* at 51a (rejecting other circuit case law "since the parties here agree" on a "competitive mode class").

In the court of appeals, petitioners acknowledged that "the parties" had "agreed on a much smaller [comparison] class below," *i.e.*, "that of the competitive mode class." Pet. C.A. Br. 23. Petitioners asked the court to "consider[] the excise tax structure that

applies to the subject of the tax (use or consumption of diesel fuel) as compared to railroads and their competitors." *Id.* at 19. Petitioners did offer the "broader theory, espoused by Justices Thomas and Ginsburg" as an alternative ground for affirmance, but they implicitly acknowledged that the argument had not been raised in the district court. *Id.* at 36-37. And, while the court of appeals ultimately decided the issue, it too relied in part on petitioners' earlier concession that "the proper comparison class for this case was [respondent's] competitors." Pet. App. 11a; see *id.* at 18a (Cox, J., dissenting); see also *id.* at 8a.

2. Petitioners do not seek further review of the one issue they *did* litigate below, *i.e.*, whether Alabama's imposition of *other* taxes on motor carriers' receipt of diesel fuel is relevant to the 4-R Act inquiry. That issue is neither fairly included in the question presented, see Pet. i, nor addressed in the body of the petition.[5] Respondent noted in its brief in opposition (at 21) that petitioners have "chosen not to seek this Court's review of the question actually decided by the lower courts," and petitioners did not contest that assertion in their reply brief. Accordingly, the issue is not properly before the Court. See Sup. Ct. R. 14.1; *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

3. The Court thus has before it a petition that (a) raises an issue that may have been waived or forfeited below and (b) fails to raise a related issue that is central to the ultimate determination whether the challenged sales and use taxes violate the 4-R Act. Even if the Court concludes that these issues warrant

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[5] The only mention of the argument is in the Statement of the Case. See Pet. 8, 9.

its review, it should await a more suitable vehicle.[6] If the Court concludes that review in this case is appropriate, however, it should add a second question presented concerning the relevance to the 4-R Act analysis of other Alabama taxes imposed on motor carriers. A merits decision by this Court that resolved the comparison-class issue, but left the complementary-tax issue undecided, would provide incomplete guidance to States, railroads, and lower courts.

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[6] A similar case that appears to raise both issues is currently pending in the Sixth Circuit. See *Illinois Cent. R.R.* v. *Tennessee Dep't of Revenue*, No. 13-6348 (oral argument scheduled for June 19, 2014).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, if the petition is granted, the Court should add the following question:

> Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

Respectfully submitted.

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MAY 2014

AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE*

Amicus American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

ATA has a direct interest in this case because many of its members operate in interstate commerce to, from, within, and through the State of Alabama. ATA members purchase, store, and consume diesel fuel in Alabama. These members compete with railroad carriers in interstate commerce in Alabama, because shippers have the ability in many cases to choose between a rail carrier and a motor carrier when they ship property to, from, or through Alabama. As the district court concluded, under

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* After timely notification, the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Alabama's challenged tax arrangements, both motor carriers and railroads pay a substantially similar tax rate on diesel fuel. ATA's members depend on this level tax playing field to compete fairly with railroads in the provision of shipping services, and the preferential treatment CSX has obtained here amounts to a substantial and unfair advantage.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this case was last before the Court, it held only that a tax paid by rail carriers, but not by its competitors, was subject to challenge under the tax discrimination provision of the Railroad Revitalization and Regulatory Reform (4-R) Act, 49 U.S.C. 11501. *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1109 & n.8 (2010). Nothing in that decision, however, suggested that in assessing the merits of such a challenge, courts should look only to how the State treats railroad competitors (rather than how it treats commercial and industrial taxpayers generally) and only to the effect of the specific tax challenged (rather than the burden of the State's overall tax treatment on the transactions at issue). On remand, the Eleventh Circuit did just that, effectively rendering tax exemptions granted to a railroad competitor a *per se* violation of Section 11501(b)(4).

Petitioners have explained in detail the division of the lower courts on the question presented by this case, and why this case presents a suitable vehicle for addressing that question. ATA submits this brief to explain further why this issue merits Supreme Court review, and why the decision below is at odds with the text and purpose of Section 11501(b).

1. The decision below results in a serious competitive disadvantage to motor carriers operating in Alabama. Alabama exempts purchases of on-road diesel from its general sales and use tax because it subjects it to a separate motor fuels tax of similar burden. The decision below gives railroads an exemption from Alabama's general sales and use tax, while motor carriers remain subject to the motor fuels tax. Because fuel represents a major cost for motor carrier operations, the impact on fair competition in interstate commerce is substantial.

2. There is no reason to think that Congress enacted Section 11501 in order to ensure that railroads could purchase fuel at a substantial discount compared to its primary competitors. Section 11501 was one of several measures enacted by Congress to stop States from unfairly shifting their tax burdens onto the backs of interstate carriers. Section 11501 does not, however, give railroads the "most-favored-taxpayer" status they have achieved with the decision below.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary Because the Decision Below Erroneously Puts Motor Carriers at a Serious Competitive Disadvantage to Railroads.

A. Alabama Treats On-Road and Off-Road Diesel Differently to Avoid Subjecting Motor Carriers to Double Taxation.

1. Alabama law imposes a general 4% tax on the sale and use of tangible goods. See Ala. Code §§ 40-23-2(1), 40-23-61(a), By default, that tax applies to purchases and use of diesel fuel by individuals or

businesses. In addition, several Alabama municipalities and counties impose additional sales and use taxes. See Pet App. 35a-36a.

Diesel fuel sold for use on roads or highways, however, is treated differently. Alabama law subjects on-road diesel to an excise tax of 19 cents per gallon. Ala. Code § 40-17-325(a). Alabama exempts fuel subject to the motor fuel excise tax from the general sales and use tax, to avoid double taxation. See Ala. Code § 40-17-325(b).

2. Alabama's practice of treating on-road and off-road diesel follows a pattern established in Federal law, and which has been widely adopted by the States. Federal law itself maintains that distinction, levying a 24.3 cent per gallon excise tax on on-road diesel, 26 U.S.C. 4081(a)(2)(A)(iii), and requiring that off-road diesel (which is exempt from that tax) be dyed to facilitate the detection of excise tax evasion, 26 U.S.C. 4082(a)(2).

In 1934, Congress conditioned receipt of Federal highway construction funds on States' use of motor vehicle fees and taxes—including gasoline taxes—for highway expenses. See Hayden-Cartwright Act, 48 Stat. 993 § 12 (1934). As a result, every State employed an on-road motor fuels tax to fund their highway programs. See Jerry L. Marshall, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 8 (1973). Congress eventually repealed that requirement in 1998. See IRS Restructuring & Reform Act of 1998, 112 Stat. 685 § 1226 (1998). Nevertheless, all 50 States and the District of Columbia continue to impose a distinct on-road motor fuels excise tax. See Federation of Tax Administrators, *State Motor Fuels*

Tax Rates, available at http://www.taxadmin.org/fta/rate/mf.pdf (collecting state motor fuel tax rates as of Jan. 1, 2013) (last visited Nov. 18, 2013). And to prevent the problem of double-taxation, most States exempt fuels subject to their motor fuels excise tax from sales tax. See John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration*, 85 (2d ed. 1994).

3. This differential treatment has tended to result in higher taxes for on-road diesel than for off-road diesel. Presumably with this in mind, Alabama law prohibits the use of off-road diesel for on-road purposes without paying the 19-cent motor fuels excise tax. Ala. Code § 40-17-350(l)(4)(d). To ATA's knowledge, there is no mirror-image prohibition against using on-road diesel for off-road purposes, presumably because generally there has been no financial incentive to do so. In other words, historically, motor carriers have typically borne a higher per-gallon diesel-fuel tax burden, and Alabama's differential treatment has if anything amounted to *preferential* treatment for railroads compared to motor carriers. See also Pet App. 56a-57a (district court's finding that, during most of the period encompassed by this lawsuit, railroads paid lower taxes on diesel than motor carriers). Section 11501(b)(4) leaves the term "discriminates" undefined, but it is peculiar indeed to conclude that it protects railroads from an arrangement that amounts to, on average, a *lower* tax burden than its motor carrier competitors bear.

B. The Decision Below Means That Railroads in Alabama Will Pay Significantly Less for Diesel Fuel than Their Primary Competitors.

Though railroads have not historically paid more tax to Alabama for diesel than motor carriers, Respondent CSX Transportation, Inc. (CSXT) in this lawsuit seeks far more than to ensure that it never has to do so. Rather, it seeks to ensure that it (and other railroads) will pay *far less* than its principal competitors when they purchase or use diesel fuel in Alabama.

1. If ensuring only that it would never pay *more* in diesel taxes than motor carriers were CSXT's goal, it could have done so in a number of ways. First, as noted above, there appears to be no prohibition on purchasing on-road diesel—for which the 19-cent per gallon motor fuels has been paid, and which is exempt from sales and use tax—and using it to power their locomotives. Second, CSXT could have sought to enjoin Alabama's sales and use tax only to the extent that it might exceed the 19 cents per gallon motor fuels excise tax. In either case, CSXT could continue to enjoy its advantage over motor carriers during periods when diesel prices are low enough to make sales and use tax less onerous than the flat motor fuels tax, with the assurance that the tables would never turn on it.[1]

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[1] To be sure, neither approach would put CSXT on the same footing as interstate water carriers, who are exempt from Alabama diesel taxes altogether. See Ala. Code §§ 40-23-4(a)(10), 40-23-62(12). However, as the district court found, CSXT has offered no evidence of the purported discriminatory effect of a tax exemption relevant to only a

2. Instead, CSXT sought to enjoin Alabama from collecting *any* tax on its diesel fuel. Pet App. 31a. The upshot of the decision below, then, is a guarantee that CSXT and other railroads will consistently pay 19 cents less than motor carriers pay for every gallon of diesel. That, in turn, translates into an enormous competitive advantage for railroads.

Fuel costs are a major component of motor carrier operations, accounting for up to 20 percent of operating costs. See Federal Highway Administration, *Evaluation of U.S. Commercial Motor Carrier Industry Challenges and Opportunities* § 6, available at http://www.ops.fhwa.dot.gov/Freight/publications/eval_mc_industry/index.htm#6 (last visited Nov. 18, 2013). Like any operational cost inputs, increased fuel costs are ultimately reflected in increased prices for a carrier's services. Effectively requiring motor carriers to pay 19 cents more than railroads per gallon of diesel in Alabama thus represents a significant competitive disadvantage.

And because, as discussed above, most States treat on-road and off-road diesel similarly, the issue presented in this case is not limited to Alabama's borders. Indeed, in the wake of CSXT's victory in the court below, another railroad quickly obtained an injunction against Tennessee's similar practices. *Ill. Cent. R. Co.* v. *Tenn. Dep't of Revenue*, No. 3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27, 2013). That case is now pending before the Sixth Circuit. See No. 13-6348 (6th Cir.). And railroads have successfully employed Section 11501(b)(4) to

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very small fraction of competing freight movements. Pet App. 64a.

invalidate similar practices elsewhere.[2] This recurrent issue affects fairness and competition in the interstate transportation sector nationwide, and thus strongly merits this Court's review.

II. Section 11501(b) Protects Railroads from States That Seek to Prey Upon Nonresident Businesses, but Does Not Offer Them "Most-Favored-Taxpayer" Status.

Section 11501(b) was enacted as part of a wider effort to address the fact that many States were taking advantage of interstate carriers by subjecting them to higher property taxes than in-state taxpayers bore. To put a stop to this phenomenon, Congress passed a number of measures intended to tie the tax fate of interstate carriers to that of the in-state taxpayers who could hold the States accountable. Properly understood, these measures—including Section 11501(b)—prevent States from preying on out-of-state industries. They do not, however, offer any particular class of carrier a leg up on its competitors, much less promise the most-favored-taxpayer status that CSXT has effectively obtained for railroads in this case.

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[2] See, *e.g.*, *Union Pac. R.R.* v. *Minnesota Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007); *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984 (8th Cir. 1999); *Kan. City S. Ry. Co.* v. *Bridges*, No. 04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007); *Burlington N. R. Co.* v. *Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338 (Iowa 1983).

A. Congress Has Repeatedly Protected Interstate Carriers by Tying Their Tax Treatment to That of In-State Commercial and Industrial Interests.

It took Congress some fifteen years from acknowledging that States were taking advantage of interstate railroads, see *National Transportation Policy*, S. Rep. No. 87-445 at 483-487 (1961), until it passed the 4-R Act in 1976. For nearly all of that period, Congress contemplated measures comprising only what were to become subsections (b)(1) to (b)(3) of Section 11501, prohibiting States from subjecting railroads to property taxes that were out of line with those paid by commercial and industrial entities generally. See Samuel Eckman, *A State-Centered Approach to Tax Discrimination under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051, 1063-1064 (2012). What was to become subsection (b)(4) was proposed only shortly before the 4-R Act's passage. See *id.* at 1064.

1. When Congress has prohibited discriminatory State taxes against interstate carriers, it has focused on prohibiting States from succumbing to the "temptation to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987). As Justice Thomas put it, "§ 11501(b) responded primarily to what its text describes—property taxes that soaked the railroads." *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J. dissenting). Congress took the same approach to property tax discrimination against motor carriers in the Motor Carrier Act of 1980 (49 U.S.C. 14502); and to property tax discrimination against air carriers in the Airport and

Airway Improvement Act of 1982 (49 U.S.C. 40116). Indeed, because of the shared need to protect *all* interstate carriers from this kind of predation, the trucking industry supported the inclusion of Section 11501 in the 4-R Act. See, *e.g.*, *Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1166, 1178 (1975) (statement of Peter Beardsley, ATA Vice President and general counsel); *Railroad Revitalization, Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Interstate and Foreign Commerce*, 94th Cong. 618, 621 (1975) (same).

Congress's purpose in enacting these protections has not been to pick winners and losers among the interstate carrier interests it sought to protect, but simply to "place them on an even playing field with other state taxpayers." *Atchison, Topeka, and Santa Fe Ry. Co.* v. *Arizona*, 78 F.3d 438, 442 (9th Cir. 1996). In each case, Congress achieved its purpose by directly tying the railroads' (and other interstate carriers') "tax fate to the fate of a large and local group of taxpayers." *Kan. City S. Rwy. Co.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). That tie establishes a substantial political check on States, because it means that in order to "overtax" rail, motor, or air carriers, States would have to similarly "overtax" resident businesses in general—resident businesses with the ability to hold the legislature accountable.

The text of the statutes make explicit that this is the strategy employed by the first three subsections of 11501(b), and in the parallel protections for motor and air carriers. Absent any indication in the text or legislative history to suggest that Congress departed

radically from that consistent approach when it added 11501(b)(4) to the 4-R Act at the eleventh hour, the latter provision "should be understood to tackle the issue of systemic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence." *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting). See also *Kan. City S. Ry. Co.* v. *Koeller*, 653 F.3d 496, 509 (7th Cir. 2011) (discussing "the need to read subsection (b)(4) 'in light of the approach taken in the first three subsections' * * *, which all directly or indirectly look to other commercial and industrial property") (quoting *Burlington N. Ry. Co.* v. *Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991)).

2. To be sure, the 4-R Act *as a whole* had more than one purpose, and its purposes expressly included restoring railroads' financial stability and competitiveness. See, *e.g.*, *CSX*, 131 S. Ct. at 1105 (citing 4-R Act § 101(a), 90 Stat. 33); *Burlington Northern, Santa Fe Railway Co.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) (4-R Act was intended to benefit railroads by ensuring their "financial stability"). A number of individual provisions of the Act were aimed directly at furthering that goal. See, *e.g.*, 45 U.S.C. 801(a) (listing, *inter alia*, "ratemaking and regulatory reform," expedited merger procedures, and "financing mechanisms" for rehabilitation and improvement of facilities as measures intended to "restore the financial stability of the railway system of the United States" and promote its revitalization).

It does not follow from this, however, that every miscellaneous provision of the Act—including Section 11501—was intended by Congress to

promote the interests of the railroads over those of its transportation competitors. Quite the contrary, Congress's "revitalization" goal must be reconciled with another express goal of the Act, to "foster competition among all carriers by railroads *and other modes of transportation.*" 45 U.S.C. 801(b)(2) (emphasis added). "[T]he Act makes clear that a vibrant rail industry is a critical component of such competition [among transportation modes]; nevertheless, it is a means to an end rather than the end itself." Eckman, *A State-Centered Approach*, 1061. Moreover, the fact that Congress also protected motor carriers and air carriers from state tax discrimination (see pp. 9-10, *supra*) is a sure sign that the 4-R Act's tax discrimination provision was not intended to give railroads more favorable state tax treatment than its competitors receive. The decision below, and the blow it imposes on fair competition among different modes of transportation, cannot be squared with Congress's overall goals.

3. CSXT recognized as much when this case was last before this Court. Then, CSXT explained that Congress enacted Section 11501 because it found that rail carriers were "'easy prey for State and local tax assessors' in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.'" Pet. Br., *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, No. 09-520, at 3 (Aug. 12, 2010) (quoting *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987), quoting S. Rep. No. 91-630 at 3 (1969)). Similarly, the Association of American Railroads (AAR)—arguing as amicus in support of CSXT—recognized that this was the purpose of Section 11501(b), not to bolster the relative competitiveness of the railroads vis-à-vis other modes of transportation. See Br. of

AAR as Amicus Curiae in Support of Pet., *CSX Transp. Inc.* v. *Ala. Dep't of Revenue*, No. 09-520, at 7-10 (Aug. 19, 2010). As AAR explained, "[t]axing interstate railroads to benefit local constituents is a difficult potion to resist," and that "impulse is unchecked by any effective political counterweight." *Id.* at 8. "It was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501." *Ibid.* (citing S. Rep. No. 94-499, at 2-3 (1975); H.R. Rep. No. 94-725, at 53 (1975)).

B. The Decision Below Upends Congress's Strategy by Instead Granting Railroads "Most Favored Taxpayer" Status.

Alabama's decision to exempt motor carriers from sales and use tax on diesel—for the entirely sensible reason that they pay a *different* tax that is "substantially similar" in burden, Pet App. 57a—presents no risk that the State is trying to soak the railroads for a disproportionate share tax revenue. With the decision below, CSXT has taken what Congress intended as a shield against exploitation of interstate carriers and turned it into a sword by which to obtain treatment *more* favorable than both its motor carrier competitors and Alabama taxpayers generally. They have, in other words, achieved the "most-favored-taxpayers" status that this Court expressly recognized was not the goal of Section 11501. *CSX Transp.*, 131 S. Ct. at 1109 n.8.

The Eleventh Circuit could have—and should have—avoided granting CSXT (and other railroads) most-favored-taxpayer status by following the suggestion of Justices Thomas and Ginsburg to focus the inquiry under Section 11501(b)(4) on whether "a tax exemption scheme * * * target[s] or single[s] out

railroads *by comparison to general commercial and industrial taxpayers. Id.* at 1115 (Thomas, J., dissenting) (emphasis added). Its erroneous decision to instead compare CSXT's treatment only to that of its competitors—and to narrowly focus only on the challenged tax without considering whether their overall tax treatment was even-handed—merits this Court's review because it turns the purpose of Section 11501(b) on its head, at great cost to fair play and competition among interstate transportation industries.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the Court should grant the writ.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-553

In the

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONERS

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petition for Certiorari filed by Petitioners Alabama Department of Revenue and Julie Magee, Commissioner of the Alabama Department of Revenue.[1] The Commission urges this Court to accept certiorari to finally resolve a decades-long conflict among the circuits as to the correct test for "discrimination" under 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act").

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia are members of the Commission.

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Alabama. Finally, this brief is filed with the consent of the parties.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Multistate Tax Compact, Art. I.

The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.,* H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax).

Preserving state tax sovereignty under our vibrant federalism remains a key goal of the Compact and the Commission. The Commission's interest in this case arises from our goal of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is permitted under the U.S. Constitution and the clear mandate of Congress.

The ongoing uncertainty over the interpretation

and scope of the 4-R Act's prohibition of "another tax that discriminates" has already imperiled a significant source of revenue for the states, and this uncertainty may be extended to other tax impositions as well if not resolved now. But beyond these important fiscal concerns, the decision of the Eleventh Circuit below carries significant implications for state sovereignty if federal courts may adjudicate whether state laws should be preempted as "discriminatory" without reference to the guidance found in the statute itself. The use of a judicially-created comparison class of "railroad competitors" will inevitably involve the federal courts in a myriad of state tax policy decisions to a degree which was never contemplated by Congress.

The meaning of § 11501(b)(4)'s prohibition of "another tax that discriminates" should be determined with reference to the principles of federalism and the unique importance of state taxing powers in preserving sovereignty, as this Court previously held in *Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994). Congress instructed the federal courts to resolve the question of "discrimination" for property tax purposes by asking whether the railroads' taxing burden was equivalent to that generally borne by other commercial and industrial taxpayers in the jurisdiction. 49 U.S.C. § 11501(b)(1)-(b)(3). Congress chose this comparison method because it involved the least amount of intrusion into state tax policy matters. It should be assumed that Congress was similarly mindful of state tax sovereignty respecting other types of taxes as well.

The Eleventh Circuit's decision has deepened the split between the circuits as to Congress' intended rule for determining whether a state taxing system is "discriminatory." The question is now clearly presented for the Court's determination, and the Commission urges the Court to grant certiorari to resolve that dispute.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve the conflict among five federal circuits (and the highest court of Minnesota) as to the proper application of the 4-R Act's prohibition against "another tax that discriminates" in 49 U.S.C. § 11501(b)(4). A grant of certiorari is appropriate and essential in this case because: the issue is ripe for review and squarely presented in this case; there are significant fiscal and policy implications for the states; and the decision of the Eleventh Circuit is manifestly in error. The dispute between the circuits should be resolved by holding that the proper test for determining if a tax "discriminates" against railroads is whether the tax is also generally imposed on other commercial and industrial taxpayers in the state. This test is the only one supported by the structure and intent of the 4-R Act and by the principles of federalism.

ARGUMENT

Under Alabama's taxing structure—a structure common throughout the states now and at the time of the passage of the 4-R Act—a generally applicable

sales and use tax of 4% is imposed on most purchases or uses of tangible property, including diesel fuel,[2] with a corresponding exemption for diesel fuel purchased for highway use, as those purchases are subject to two separate state taxes totaling 19 cents per gallon.[3]

Although the sales and use tax on purchases of fuel by railroads is identical to the burden placed generally on all taxpayers in Alabama, the taxpayer in this case insists that the correct comparison should be limited to whether two select businesses providing different means of transportation—trucks and barges—pay not just a similar tax rate on their purchases of fuel, but also pay the identical type of tax.

When this case was previously before the Court in 2010, it held that the 4-R Act's prohibition of "discriminatory" state and local taxes could be implicated either by discriminatory impositions of excise taxes or discriminatory *exemptions* from such taxes. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, __U.S. __, 131 S.Ct. 1101, 1114 (2010).[4] But the Court declined to answer the central question of how "discrimination" should be determined for non-

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[2] *See* ALA. CODE §§ 40-23-2(1);40-23-61(a)

[3] *See* ALA. CODE § 40-17-325(a)(exemption); § 40-17-2(1); § 40-17-220(e).

[4] In so holding, the Court distinguished its previous ruling in *Dep't of Rev. of Or. v. ACF Indus., Inc.*, 510 U.S. 332 (1994) that §11501(b)(4)'s prohibition of "another tax that discriminates" did not encompass challenges to *property tax* exemptions.

property taxes under § 11501(b)(4): by using a comparison class of all other commercial and industrial taxpayers, or of only those so-called railroad "competitors," such as barge lines and trucking companies.

Because the question of how discrimination should be determined had not been fully addressed below, the Court remanded the case, instructing that the issue of whether Alabama's sales tax on fuel was "discriminatory" hinged on whether the state could demonstrate "a sufficient justification for declining to provide the exemption at issue to rail carriers." *CSX*, 131 S.Ct. at 1109, fn. 8.

Two justices dissented from that holding, arguing that the question of proper comparison classes must be settled before the "justifications" for the exemption should be considered. *CSX*, 131 S.Ct. at 1114-1120. (Thomas, J., *dissenting.*) The dissent argued that if the correct comparison class of taxpayers was considered—industrial and commercial taxpayers who were also generally subjected to the same sales and use taxes—it was unnecessary and improper to consider whether the tax exemption was "discriminatory" with respect to how "competitors" were treated. *Id.* at 1117. The dissent noted that using the broader comparison class, "settles the ambiguity in the word 'discriminates' by reference to the rest of the statute and gives subsection (b)(4) a reach consistent with the problem the statute addressed." *Id.* at 1115.

On remand, the Eleventh Circuit held that the

correct comparison class should be "railroad competitors", even though that concept cannot be found within the text of the 4-R Act. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 720 F.3d 863 (11th Cir. 2013) ("*CSX II*"). The correctness of this 11th Circuit holding is the very question this Court held open for decision in *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S.Ct. 1101 (2010). Whether an excise taxing scheme that imposes the identical tax burden on a railroad as is borne by almost all commercial and industrial taxpayers in the state "discriminates" against railroads within the meaning of 49 U.S.C. § 11501(b)(4) of the 1976 4-R Act is now appropriately before the court for review.

A. There is a Split among the Circuits as to the Interpretation of a Significant Provision of Federal Law.

The Eleventh Circuit has now joined the Eighth Circuit and the Supreme Court of Minnesota[5] and two lower courts[6] in striking down long-standing tax systems relied upon by the states without a single textual reference to the 4R-Act mentioning "competitors" in the context of state taxation. Compounding matters, each of these courts has further held that compensatory highway excise taxes

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[5] *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999); *Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993).

[6] *Ill. Cent. R. Co. v. Tenn. Dep't of Revenue*, No.3:10-CV-00197, 2013 WL 4521013 (M.D. Tenn. Aug. 27 2013); *Kan. City S. Ry. Co. v. Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007).

borne by the railroads' principal "competitors" could not be considered as a justification for the "discriminatory" tax treatment. The Eleventh Circuit reached the conclusion that Alabama's excise tax discriminated against railroads even though the district court found—and the finding was not challenged on appeal—that motor carriers actually paid a higher tax on fuel than the railroads. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 892 F.Supp.2d 1300, 1312 (N.D. Ala. 2012) (*Appendix*, p. 56a.).

In contrast to the decisions of the Eighth and Eleventh Circuits, the Fifth, Seventh and Ninth Circuits have held that the proper test should be whether the tax is generally imposed on commercial and industrial taxpayers. [7] These courts have recognized that the use of the broader class is appropriate because it is the class chosen by Congress for measuring whether state property taxes "discriminate" against railroads. In *Atchison, Topeka & Santa Fe Ry. Co. v. Ariz.*, 78 F.3d 438, 442 (9th Cir. 1996), the court noted that:

> [T]he purpose of the 4-R Act was not to grant railroads preferential treatment. [citation omitted.] Rather, in adopting the 4-R Act, Congress' purpose was to remedy discrimination against the railroads and place them on an even playing field with other state

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[7] *Kan. City S. Ry. Co. v. McNamara* 871 F.2d 368 (5th. Cir. 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996); *Burlington B. R.R. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991); *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011).

taxpayers. [citation omitted.].

> The comparison class of "commercial and industrial taxpayers subject to the tax" must be used in analyzing the Arizona tax scheme because a narrow comparison class, comprised only of "motor carriers," would result in preferential treatment for the railroads.

Use of the broader class not only implements congressional intent to place railroads on an equal basis with other taxpayers, but the broader comparison class also allows for a meaningful application of the 4-R Act where it is alleged that a state tax disparately burdens *all* transportation companies, *Kan. City S. Ry. Co. v. McNamara,* 871 F.2d 368 (5th Cir. 1987), or where there are no "competitors" in the taxing jurisdiction. *Kan. City S. Ry. Co. v. Koeller,* 653 F.3d 496 (7th Cir. 2011).

Thus, there is a profound split among the circuits as to how discrimination should be measured in the context of taxes other than property taxes for purposes of the 4-R Act's "another tax that discriminates" clause.

B. The Issue is of Vital Importance to the States.

The tax regime CSX seeks to challenge as "discriminatory" in this case is common throughout the states. Forty-five of the fifty states (and the District of Columbia) impose a general sales tax on

tangible personal property purchases or use. [8] Purchases of fuel for highway use, however, are exempt from taxation in forty-three states. JOHN F. DUE & JOHN L. MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION (Urban Inst. Press 2d ed. 1994) (1983). In virtually all of those states,[9] the exemptions for highway use fuel were in place well before passage of the 4-R Act in 1976. Highway use fuel is subject to a separate excise tax in every state, with a low of 8 cents per gallon in Alaska to a high of 51.2 cents in Connecticut, with the great majority of states imposing a highway fuel tax in excess of 20 cents per gallon. [10] The States' long-standing and nearly-universal taxing regime was presumably well known to Congress in 1976, yet the system of sales tax

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[8] FED. OF TAX ADMIN., STATE SALES TAX RATES http://www.taxadmin.org/fta/rate/sales.pdf.

[9] Arkansas, ARK. CODE ANN. § 26-55-208 (1941); Connecticut, CONN. GEN. STAT. § 12-412(15) (1947); Kentucky, KY. REV. STAT. ANN. § 139.470(18) (1960); Massachusetts, MASS. GEN. LAWS ch. 64H § 6(g) (1967); Minnesota, MINN. STAT. § 297A.68(19)(1) (1967); Nebraska, NEB. REV. STAT. § 77-2704.05 (1967); Nevada, NEV. REV. STAT. § 372.275 (1955); New Mexico, N.M. STAT. § 7-9-26 (1969); Pennsylvania, 72 PA. CONS. STAT. § 7204(11) (1953); South Dakota, S.D. CODIFIED LAWS § 10-45-11 (1939); Utah, UTAH CODE ANN. § 59-12-104(1) (1933); Wisconsin, WIS. STAT. § 77.54(11) (1969). *See also, e.g.*, Arizona, ARIZ. REV. STAT. ANN. § 28-5606; District of Columbia, D.C. CODE § 47-2301; Delaware, 30 DEL. CODE ANN. § 5110; Florida, FLA. STAT. ANN. § 206.41; Iowa, IOWA CODE ANN. § 452A.3; Idaho, IDAHO CODE ANN. § 63-2402; Illinois, 35 ILL. COMP. STAT. 505/17; Kentucky, KY. REV. STAT. ANN. § 138.220; Louisiana, La. Rev. Stat. Ann. § 47:802; Maine, 36 ME. REV. STAT. ANN. § 2903.

[10] FED. OF TAX ADMIN., STATE MOTOR FUELS TAX RATES (2013), http://www.taxadmin.org/fta/rate/mf.pdf.

exemptions for purchases subject to separate highway taxes were never mentioned in fifteen years of legislative hearings and study preceding the Act.

The potential economic impact to the states from the Eighth and Eleventh Circuit's sweeping interpretation of the 4-R Act's preemptive effect would be enormous. CSX alone spent $1.672 billion on diesel fuel in 2012.[11] If these Circuits' holding were extended to all states in which CSX operates, and assuming the states apply a use tax at an average 5% rate, the revenue loss to those states could be as high as $83.6 million annually for this single railroad, with no offset for the amounts its primary "competitor" paid in compensating highway taxes.

C. The Lower Court's Decision Was Erroneous and Warrants Reversal.

1. The Same Comparison Class Should Be Used for Determining "Discrimination" in Property and Excise Tax Cases.

The structure of the 4-R Act's prohibition of discriminatory state taxes does not support use of a comparison class other than "all industrial and commercial taxpayers." Sections 11501(b)(1) though (b)(3) outline detailed rules for determining whether a state or locality's property tax system "discriminates" against railroad properties relative

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[11] CSX 2012 ANNUAL REPORT, p. 33, *available at* http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Nov. 22, 2013)

to all other commercial and industrial property. Section 11501(b)(4) prohibits "another tax that discriminates." There is no rationale for re-interpreting "discrimination" in (b)(4) to mean something other than what it meant in (b)(1) – (3).

Had Congress been concerned with the tax burdens on railroads relative to its "competitors", it presumably would have addressed those concerns in the property tax arena as well, by including an additional prohibition against more favorable treatment of other "transportation property", either through exemptions or rates. But Congress made no such effort to address different property tax burdens for "competitors." In fact, in 49 U.S.C. § 11501(a) Congress exempted "other transportation property" (and agricultural property) from the scope of commercial and industrial property subject to comparison with railroad property burdens.

Since Congress selected the average tax burden imposed on all "commercial and industrial" properties subject to assessment for purposes of determining property tax discrimination, it follows that Congress intended to use that same comparison class for its more general prohibition of "another tax that discriminates" in § 11501(b)(4). In both instances, the political power of the broad class of taxpayers subject to the same tax impositions provides adequate protection against excessive taxation.

2. Principles of Federalism Require that Congressional Intent to Interfere With State Taxing Powers be Narrowly Construed; the Use of a Broad Comparison Class Requires Less Interference with State Policy Choices While Still Protecting Railroads.

The controversy over the proper "comparison class" for determining whether a state taxing system "discriminates" has profound implications for state and federal relations.

As this Court recognized in *ACF Industries*, Congress' limitation of the comparison class for property tax discrimination to "assessed" properties signaled its reluctance to unduly interfere with state policy choices. 510 U.S. at 344-345. Congress was aware that state property tax systems often included exemptions for particular commercial and industrial enterprises in order to favor economic development or other social purposes, such as exempting pollution control systems. *Id.* If Congress included those exempted properties in the comparison base, it would result in the railroads receiving more favorable treatment than the bulk of commercial and industrial taxpayers, or would pressure states to eliminate the exemptions it had previously granted

Because Congress was aware of the state practices regarding property tax emptions, yet had not explicitly prohibited the practice, principles of federalism thus "compelled" a reading of Section (b)(4) to avoid that result. *ACF Industries* at 345. "[I]f Congress intends to alter the usual

constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress should make its intentions 'clear and manifest' if it intends to preempt the historic powers of the States"); *See also, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

If the holdings of the Eighth and Eleven Circuits are allowed to stand, federal courts in those jurisdictions would be far more deeply involved in state tax policy decisions, because it would be necessary to: (1) determine what industries (*e.g.*, trucks, airlines, barges, pipelines) actually compete with railroads within a jurisdiction;[12] (2) determine which state and local taxes and exemptions could have a direct or indirect disparate effect on these industries; (3) determine whether other taxes might offset or compensate for the disparate taxes; (4) determine whether the state or locality has

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[12] It should not be assumed that railroads actually "compete" with trucks and barges for transportation services in every instance, since the relationship among these different modes of transportation may be symbiotic, not competitive. In 2012, 38% of CSX's traffic volume consisted of intermodal shipping, "combin[ing] the superior economics of train transportation with the short-haul flexibility of trucks...." *CSX 2012 Annual Report* (p. 17). In the same *Annual Report*, CSX lists among its business concerns: "...the challenges associated with labor, *fuel* and other costs at *trucking companies*, which today are partnering with us for longer-haul movements." *Id.*, p. 6. (emphasis supplied.)
http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Nov. 22, 2013).

sufficiently justified that disparate treatment; and (5) determine whether the state or locality's remedy eliminates any "discrimination" found. Each of these steps must be undertaken without any guidance from Congress. As a result, the federal courts will be required to make these decisions on an *ad hoc* basis, engaging in what should be a legislative function, all but guaranteeing inconsistent application.

By contrast, under the approach endorsed by the Fifth, Seventh and Ninth Circuits, the scope of inquiry is far narrower. The sole question presented for determination is whether the tax imposition on the railroads is also generally imposed on the bulk of commercial and industrial taxpayers in the state. If so, it should be presumed, absent evidence to the contrary,[13] that the political power of those citizens has protected the railroads from undue economic burdens. This inquiry is far more straightforward and does not involve the federal courts in complex economic analysis or second-guessing state policy-making decisions.

Where congressional legislation "impinges upon or pre-empts the states' traditional powers, we are hesitant to extend the statute beyond its evident scope." *ACF Industries* at 345. "This presumption against preemption leads...to the principle that express preemption statutory provisions should be

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[13] As the Court noted in *ACF Industries, supra* at 346-7, Congress surely would have been concerned with *any* taxing scheme which imposed a generally applicable tax but then exempted everyone except the railroads from its reach. That scenario is not presented by the facts of this case.

given a narrow interpretation," *Gordon v. Virtumundo, Inc.* 575 F.3d 1040, 1060 (9th Cir. 2009) (quoting *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation and Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005)). *See also, Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 533 (1992) and *Maryland v. Louisiana*, 451 U.S. 735 (1981).

The same federalism concerns support the conclusion that Congress did not intend to upset the states' well-established pattern of sales tax exemptions of fuel subject to a separate highway tax in adopting § 11501(b)(4). Railroads, trucking companies, airlines, barge companies and pipeline companies are not identically-situated taxpayers. They perform different—although sometimes complimentary—transportation functions, operate under different regulatory structures, receive different forms of government assistance and subsidies, and impose different societal costs and benefits. Those differences in regulatory structure, operation and function have inevitably been reflected in differences in how taxes are imposed. Congress was aware of these differences in taxing systems in 1976 but made no attempt to address them in the 4-R Act.

Instead, Congress sought to protect the railroads from taxes that singled them out for tax extractions not shared by local commercial and industrial taxpayers as a whole.

Principles of federalism strongly suggest that without clear legislative guidance, the federal courts

should not immerse themselves in determining whether any differences in the taxing structures applicable to these different industries are justifiable. But adoption of a "competitive class" comparison group under the 4-R Act would have just such an effect.

3. Failure to Consider the States' Compensating Tax System in Assessing Whether a Tax Statute "Discriminates" Defeats Congressional Intent to Put Railroads on an Equal Footing With Other Commercial and Industrial Businesses.

Both the Eighth and Eleventh Circuits recognized that the motor transportation competitors paid substantial amounts of motor fuel taxes in lieu of use taxes. Yet both courts refused to undertake an analysis of the effects these taxes had on ability of railroads to compete with motor carriers, because they were contained in separate tax statutes. *CSX II,* 720 F.3d at 871; *Burlington N., Santa Fe Ry. Co. v. Lohman,* 193 F.3d 984, 986 (8th Cir. 1999)("A state's overall tax structure need not be examined under the 4–R Act even if fair taxing arrangements exist, such as taxing one business with property taxes and another with sales taxes, 'because the actual fairness of those arrangements is too difficult and expensive to evaluate'", *quoting Trailer Train Co. v. State Tax Comm'n,* 929 F.2d 1300, 1303 (8th Cir. 1991).).

Eliminating the states' sales and uses tax on railroad fuel while retaining the excise tax burden

on highway fuel would simply create "discrimination" against trucking companies, rather than alleviating discrimination against railroads. This was not Congress' intent in passing the 4-R Act.

If Congress had intended for the courts to undertake a "comparison class" approach for determining discrimination, Congress would have expected the courts to look at a state's entire compensating tax structure, not components in isolation. As this Court announced in *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981), "A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." Under this Court's compensatory tax doctrine used to determine if state taxes "discriminate" against interstate commerce, where two taxes are imposed on "substantially equivalent event[s]", they should be considered together in determining whether discrimination has occurred. *Id.* at 769.

By the same token, once the lower courts determined that it was appropriate to compare the railroads' tax burdens to the burdens imposed on other industries engaged in transportation activities, it would have been appropriate to compare tax burdens on the purchase of fuel for those "substantially similar" activities. As the dissent noted in *Trailer Train Co. v. State Tax Comm'n,* 929 F.2d at 1304: "I do not believe Congress has broadly eliminated taxation of the railroads without a demonstration of a discriminatory result by comparison to other taxes and taxpayers under

subsection (d). I believe such a demonstration is still necessary lest Congress be openly called a fool." (Gibson, J., *dissenting.*)

The Eleventh Circuit's justification for failing to undertake a comparative tax analysis—that the expense and trouble would be excessive where the use tax burden might exceed the fuel excise tax burden in some months but not others—is plainly an insufficient one. *CSX II,* at 870-71. The case of *Assoc. Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994), is instructive in that regard. Missouri imposed an "additional use tax" on goods purchased out of state, which when combined with state and local sales and use taxes had the effect of imposing a higher burden on out-of-state purchases in some counties but not in others. This Court held that the appropriate remedy was to adjust the combined tax burden in each county to ensure interstate sales were treated equally with intra-state sales. 511 U.S. at 654. The Court rejected the taxpayers' arguments that the entire "additional use tax" should be stricken because of the burden of the county-by-county inquiry, *Id.* at 655, or because of the possibility that future changes in tax rates could once again result in discriminatory treatment, noting, "[W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Id.* at 654.

This Court cautioned that "discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately

justified." 131 S.Ct. at 1114. The court below failed to adequately address the state's justification for its dissimilar but roughly equal treatment of purchases by different industries. The "excessive cost" analysis is just one more judicial construct found nowhere in the text of the 4-R Act, and a very problematic construct given the millions of dollars of revenues at stake in Alabama and elsewhere.[14]

CONCLUSION

The Court should accept certiorari in this case to resolve the deep split between the circuits as to the correct comparison class for determining whether a state taxing system "discriminates" against railroads. But the Court should also take this case to return 4-R Act jurisprudence to the fundamental rule that federal legislation purporting to preempt state tax choices should be construed narrowly under principles of federalism. It should not be presumed that Congress intended to empower the federal courts to create a new basis for evaluating discriminatory taxes under the 4-R Act.

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[14] That the state could prospectively "remedy" what the Eleventh Circuit held was a discriminatory tax merely by eliminating the sales tax exemption and decreasing the fuel excise tax by a similar amount, without affecting the actual tax burden on either "competitor", is more evidence of the lack of actual discrimination. *Cf., McKesson Corp v. Div. of Alcoholic Beverages & Tobacco of Florida,* 496 U.S. 18 (1990)(identifying means to remedy discrimination).

Respectfully submitted,

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JOINT APPENDIX

No. 13-553

In the

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 15-553 Petition For A Writ Of Certiorari at the following pages:

Defendants' Post-Trial Brief, *CSX Transp., Inc., v. Ala. Dep't of Revenue, et al.*, No. 2:08-CV-00655-AKK (U.S. District Court, Northern District of Alabama, May 29, 2012).....74a

Defendants' Post-Trial Reply Brief, *CSX Transp., Inc., v. Ala. Dep't of Revenue, et al.*, No. 2:08-CV-00655-AKK (U.S. District Court, Northern District of Alabama, June 8, 2012) 92a

Opinion, *CSX Transp., Inc., v. Ala. Dep't of Revenue, et al.*, No. 2:08-CV-00655-AKK (U.S. District Court, Northern District of Alabama, Aug. 24, 2012) 32a

Order, *CSX Transp., Inc., v. Ala. Dep't of Revenue, et al.*, No. 2:08-CV-00655-AKK (U.S. District Court, Northern District of Alabama, Aug. 24, 2012) 72a

Opinion, *CSX Transp., Inc., v. Ala. Dep't of Revenue, et al.*, No. 12-14611 (11th Cir. Feb. 27, 2013).....1a

Letter granting extension, *Ala. Dep't of Revenue, et al., v. CSX Transportation, Inc.*, No. 13A275 (U.S. Supreme Court, Sept. 19, 2013).....99a

RELEVANT DOCKET ENTRIES FOR U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (SOUTHERN)

CIVIL DOCKET FOR CASE #: 2:08-cv-00655-AKK

Date Filed	#	Docket Text
04/14/2008	1	COMPLAINT against Alabama Department of Revenue, Tim Russell (Filing Fee $ 350 Paid), filed by CSX Transportation, Inc..
05/01/2008	4	ANSWER to Complaint by Alabama Department of Revenue, Tim Russell.
05/29/2008	5	MOTION for Preliminary Injunction by CSX Transportation, Inc..
05/29/2008	6	Brief re 5 MOTION for Preliminary Injunction filed by CSX Transportation, Inc.. (Attachments)
05/29/2008	7	NOTICE by CSX Transportation, Inc. re 5 MOTION for Preliminary Injunction (Attachments)
06/06/2008	9	REPLY Brief filed by Defendants Alabama Department of Revenue, Tim Russell re: 5 MOTION for Preliminary Injunction, 6 Brief *Response to Plaintiff's Request for Preliminary Injunction* filed by

		Alabama Department of Revenue, Tim Russell. (Attachments)
06/13/2008	10	REPLY to Response to Motion re 5 MOTION for Preliminary Injunction filed by CSX Transportation, Inc..
06/18/2008	11	MOTION for Leave to File *Supplement to its Motion for Preliminary Injunction* by CSX Transportation, Inc.. (Attachments)
06/20/2008	12	STIPULATION re 5 MOTION for Preliminary Injunction *(Joint)* by CSX Transportation, Inc..
07/08/2008	13	MEMORANDUM OPINION In Re Plaintiff's Motion for Preliminary Injunction. Signed by Judge U W Clemon on July 8, 2008.
07/08/2008	14	PRELIMINARY INJUNCTION consistent with accompanying Memorandum Opinion 13 it is ORDERED that the defendants Alabama Department of Revenue and Tim Russellare hereby PRELIMINARILY ENJOINED AND RESTRAINED from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by CSXT, Inc., pending a trial and determination on the merits of plaintiff's complaint; Plaintiff

		SHALL PAY disputed tax funds AS SET OUT in this Order. Signed by Judge U W Clemon on July 8, 2008.
07/23/2008	18	MOTION to Stay *Proceedings* by Alabama Department of Revenue, Tim Russell.
07/23/2008	19	ORDER GRANTING defendant's 18 Motion to Stay [NO WRITTEN ORDER]. Signed by Judge U W Clemon on July 23, 2008.
08/21/2008	21	NOTICE by CSX Transportation, Inc. *of Establishment of Escrow Fund*
12/16/2008	22	ORDER DISMISSING CASE. Signed by Judge U W Clemon on 12/16/08.
01/15/2009	23	NOTICE OF APPEAL by defendant CSX Transportation, Inc., re 22 Order Dismissing Case *Notice of Appeal*
01/29/2009		TRANSMISSION of Notice of Appeal and Docket Sheet to US Court of Appeals.
09/30/2009	28	USCA JUDGMENT that the Court's decision is AFFIRMED issued as mandate 9/30/2009 before USCA Circuit Judges BLACK,

		BARKETT, and HILL w/slip opinion attached as to Notice of Appeal.
02/28/2011		Case Reassigned to Judge Abdul K Kallon. Judge U W Clemon no longer assigned to the case.
03/10/2011	35	***VACATRED ORDER REINSTATING PRELIMINARY INJUNCTION: re 30 Emergency MOTION for Preliminary Injunction *To Be Restored* filed by CSX Transportation, Inc. It is hereby ORDERED that defendants are hereby PRELIMINARILY ENJOINED AND RESTRAINED from assessing, levying, and/or collecting taxes on diesel fuel purchases and use by plaintiff CSX Transportation, Inc., pending a trial and determination on the merits of plaintiffs cause of action, as further set out in order. Signed by Judge Abdul K Kallon on 03/10/2011. (CVA)***** VACATED per ORDER 80 **** Modified on 8/13/2013
05/04/2011	38	USCA ORDER ON REMAND: Before Barkett, Hill and Black, Circuit Judges: Prior decision vacated; District Court order

		vacated and remanded, deemed filed 4/27/11.
05/25/2011	39	ORDER of USCA: Before Barkett, Hill and Black, Circuit Judges, Judgment issued as Mandate on 5/24/11. Prior decision vacated, District Court Order Vacated and Remanded.
07/28/2011	43	Brief re 42 MOTION for J[illegible]der *and to Amend the Complaint* filed by CSX Transportation, Inc. (Attachments)
08/02/2011	44	ANSWER to Plaintiff's Amended Complaint by Alabama Department of Revenue, Tim Russell. (Attachments)
04/09/2012	58	MOTION in Limine by Alabama Department of Revenue, Tim Russell. (Attachments)
04/09/2012	59	Brief re 58 MOTION in Limine filed by Alabama Department of Revenue, Tim Russell. (Attachments)
04/10/2012	61	PRETRIAL BRIEF by CSX Transportation, Inc. (Attachments)
04/12/2012	62	*Defendants' Response to Plaintiff's Pretrial Brief* by Alabama

		Department of Revenue, Tim Russell.
04/13/2012	63	Statement of Facts *And Conclusions of Law as Agreed by Parties* by CSX Transportation, Inc. filed by CSX Transportation, Inc.
04/18/2012	64	RESPONSE in Opposition re 58 MOTION in Limine filed by CSX Transportation, Inc.. (Attachments)
04/25/2012		Minute Entry for proceedings held before Judge Abdul K Kallon: Bench Trial Begun on 4/25/2012. 58 Motion in Limine DENIED as stated on the record. Pla's testimony begun. Pla rests. Dft's testimony begun. Dft rests. Exhibits admitted. Post trial briefs are due 21 days after filing of transcripts. Rebuttal briefs are due 10 days thereafter. Initial briefs are limited to 20 pages; rebuttal briefs are limited to 10 pages. Bench Trial completed on 4/25/2012. Court adj. (Court Reporter Sabrina Lewis)
05/07/2012	65	Transcript of Proceedings held on 04/25/12, before Judge Abdul K. Kallon. Court Reporter/Transcriber Sabrina Lewis. Transcript may be

		viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. NOTICE: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. (A copy can be obtained at http://www.alnd.uscourts.gov/local/courtforms/transcripts/Transcript Redaction Policy.pdf) See Transcript Redaction Policy Redaction Request due 5/29/2012. Redacted Transcript Deadline set for 6/7/2012. Release of Transcript Restriction set for 8/6/2012.
05/29/2012	67	Defendants' Post-Trial Brief.
05/29/2012	68	Plaintiff's Post-Trial Memorandum of Law.
06/08/2012	69	TRIAL BRIEF *Post-trial reply* by Alabama Department of Revenue, Tim Russell.
06/08/2012	70	Brief *(Post-Trial Reply) of CSX Transportation, Inc.*

08/24/2012	71	MEMORANDUM OPINION. Signed by Judge Abdul K Kallon on 08/24/12.
08/24/2012	72	ORDER: For the reasons set forth in the accompanying Memorandum Opinion, the court finds no violation of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11501. As such, the court DISMISSES CSX Transportation, Inc.'s Complaint with prejudice. In light of this decision, the court also VACATES its Preliminary Injunction issued on March 10, 2011, 35 , and ORDERS the disbursement of the disputed tax funds from the Escrow Fund to the Alabama Department of Revenue. Signed by Judge Abdul K Kallon on 08/24/12.
08/28/2012	73	MOTION (Unopposed) to Restore Injunction Pending Appeal by CSX Transportation, Inc.
08/28/2012	74	Brief in Support of 73 , Motion. (Attachments)
08/29/2012	75	ORDER: 72 , Motion to Reinstate Preliminary Injunction, is GRANTED. 35 , Preliminary Injunction dated 3/10/11, is reinstated pending Plaintiff's

		appeal of the Court's 8/24/12 Order. Signed by Judge Abdul K Kallon on 08/29/2012.
08/30/2012	76	NOTICE OF APPEAL as to 71 Memorandum Opinion, 72 Order Dismissing Case, by CSX Transportation, Inc. Filing fee $455, receipt number 1126-1745599 (NDAL Receipt No. B4601036600).
08/23/2013	84	AMENDED ORDER Upon mandate from the Eleventh Circuit Court of Appeals, 79 , Defendants Alabama Department of Revenue, the Commissioner, and all those acting in concert or participating with them who receive actual notice of this Amended Order by publication or otherwise are ENJOINED as set out in this Amended Order. This Amended Order does not disturb the Court's previous VACATION of the Preliminary Injunction issued on March 10, 2011, 35 , nor the ORDER for disbursement of the disputed tax funds from the Escrow Fund to CSXT. Signed by Judge Abdul K Kallon on 08/23/2013.

RELEVANT DOCKET ENTRIES FOR UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

12-14611

09/06/2012	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant CSX Transportation, Inc. on 08/30/2012. Fee Status: Fee Paid. Appellant brief due 40 days from 09/06/2012. No hearings to be transcribed.
10/16/2012	Appellant's brief filed by CSX Transportation, Inc.. Service date: 10/16/2012 [12-14611]
10/16/2012	Corrected brief received on 11/07/2012 from Appellant CSX Transportation, Inc.. All deficiencies have been corrected.
10/17/2012	Expanded Record Excerpts filed [1 VOLUMES – 5 sets] by Attorney Stephen Dorr Goodwin for Appellant CSX Transportation, Inc.. Deficiencies: Missing Table of Record References.
10/17/2012	Corrected expanded record excerpts received on 11/07/2012 from Appellant CSX Transportation, Inc.. All deficiencies have been corrected.
10/23/2012	Amicus Brief filed by Theodore N. Nemeroff Association of American Railroads.

11/13/2012	E-Brief Tendered: Appellee brief for Appellee Alabama Department of Revenue.
11/28/2012	Reply Brief filed by Appellant CSX Transportation, Inc..
03/20/2013	Oral argument held. Oral Argument participants were Stephen Dorr Goodwin for Appellant CSX Transportation, Inc. and Margaret Johnson McNeill for Appellees Alabama Department of Revenue and Commissioner, Alabama Department of Revenue.
07/01/2013	Opinion issued by court as to Appellant CSX Transportation, Inc.. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. (Opinion Corrected on 7/2/2013)
07/01/2013	Judgment entered as to Appellant CSX Transportation, Inc.
08/01/2013	Mandate issued as to Appellant CSX Transportation, Inc.
09/25/2013	Extension for filing certiorari up to and including October 30, 2013 is GRANTED by U.S. Supreme Court as to Appellees Alabama Department of Revenue and Commissioner, Alabama Department of Revenue.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORATION, INC.,

Plaintiff,

v. Case No. 2:08-cv-00655-AKK

ALABAMA DEPARTMENT OF REVENUE, and Julie P. Magee, Commissioner of the Alabama Department of Revenue, and MONTGOMERY COUNTY, ALABAMA,

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FROM DISCRIMINATORY STATE TAXATION

1. This is a civil action seeking to restrain and enjoin defendants, and all those acting in concert or participating with them, from assessing, levying, or collecting from plaintiff Alabama sales and use taxes on plaintiff's purchase or consumption of diesel fuel and gasoline used for rail transportation purposes in Alabama.

2. Plaintiff contends that defendants' imposition of Alabama sales and use taxes on diesel fuel and gasoline purchased and used for rail transportation purposes is discriminatory and

unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (February 5, 1976), now codified as 49 U.S.C. § 11501 and referred to herein as "Section 306." Plaintiff also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that defendants' imposition of sales and use taxes on the purchase and consumption of diesel fuel and gasoline for rail transportation purposes in Alabama violates Section 306.

JURISDICTION

3. Jurisdiction of this Court is based upon the following grounds:

(a) Section 306(1), which confers jurisdiction upon district courts of the United States to prevent a state, subdivision of a state, or any governmental entity or person acting for a state or subdivision, from imposing discriminatory taxes on common carriers by rail;

(b) 28 U.S.C. § 1331 [as more fully appears herein, this action arises under the U.S. Constitution, Art I, §8, Cl. 3 (Commerce Clause), and Amend. XIV, and presents a federal question].

VENUE

4. All of the defendants reside in Alabama, and one or more have offices in this district or reside in this district. A substantial number of the actions complained of have and will occur in this district, and any or all of the defendants may be found in this

district. Thus venue lies in this Court under 28 U.S.C. § 1391(b).

PARTIES

5. Plaintiff CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business located in Jacksonville, Florida. CSXT is engaged in interstate commerce as a common carrier by railroad.

6. The Alabama Department of Revenue ("Department") is the department of the State of Alabama charged with the responsibility to administer and collect taxes within Alabama, including the administration of sales and use taxes.

7. Defendant Julie Magee is the Commissioner of Revenue of the State of Alabama ("Commissioner"), and is named in this action in her official capacity only. As Commissioner, Ms. Magee exercises general supervision over administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes.

8. Defendant Montgomery County, Alabama is a political subdivision of the State of Alabama.

ALABAMA SALES AND USE TAXES

9. Generally, Alabama imposes sales tax on the gross receipts from the business of selling at retail or renting tangible personal property, or of furnishing entertainment.

10. The sales tax is imposed on retailers, including operators of places of amusement.

11. Although it is collected from retailers, the Alabama sales tax is conclusively presumed to be a direct tax on the retail consumer, and is precollected from retailers for convenience and facility only. Ala. Code § 40-23-26(c)(2003 Repl.).

12. Alabama imposes a use tax on the storage, use or consumption of tangible personal property in Alabama. Ala. Code § 40-23-60(2003 Repl.), *et seq.*

13. The Commissioner, acting through the Alabama Department of Revenue, collects and administers Alabama sales and use taxes.

14. Revenues from the Alabama sales and use tax are deposited in the State Treasury for disposition as allocated in Ala. Code § 40-23-35 and 40-23-85 (2003 Repl.). Railroads are not express beneficiaries of the sales and use taxes they pay to the State.

15. Railroads are subject to sales or use tax on either their purchase or consumption or use of diesel fuel in this State. The tax is imposed by the State at the rate of 4%, plus additional amounts imposed at varying rates by many Alabama counties and municipalities.

16. CSXT holds a direct pay permit issued by the Department and pays state and local use taxes upon its use or consumption of diesel fuel within this State.

17. The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ("motor carriers") and carriers of property in interstate commerce by ships, barges and other

vessels ("water carriers"). Air carriers also are engaged in the transportation of property in interstate commerce in the State of Alabama, but only marginally compete with rail carriers due to the relatively small size and weight of the property transported by air carriers.

18. Motor carriers are exempt from sales or use tax on the purchase or consumption of diesel fuel in the State of Alabama. Ala. Code §§ 40-17-2(1)(2003 Repl.).

19. Water carriers are exempt from sales or use taxes on their purchase or consumption of diesel fuel in the State of Alabama used for interstate transportation. Ala. Code § 40-23-4(a)(10)(2003 Repl.)(sales tax); Ala. Code § 40-23-62(12)(2003 Repl.)(use tax). While water carriers are subject to sales and use tax on fuel used for intrastate shipments, only 0.5% of water carriage tonnage is intrastate.

20. Fuel costs incurred in the transportation of property in interstate commerce are a major annual operating expense of rail carriers, motor carriers and water carriers.

21. Alabama state law authorizes counties to impose sales and use taxes that parallel the taxes imposed by Sections 40-23-1 to -213 of the Alabama Code, except as to the rate of tax. *See* Ala. Code § 40-12-4(b).

22. Defendant Montgomery County, acting in concert with defendants Alabama Department of Revenue and Julie Magee, administers and collects an additional sales and use tax of 2.5% on the

purchase and use of railroad diesel fuel in Montgomery County Alabama.

SECTION 306

23. Section 306 (a copy of which is attached hereto) declares that discriminatory taxation of transportation property by states, political subdivisions of a state, or governmental entities or persons acting on behalf of such states or subdivisions, is unlawful and constitutes an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. Section 306 states, in part:

> (1) . . . [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or a person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> ****[Subsections (a) through (c) deal with discriminatory property taxes.]
>
> **(d) <u>The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.</u>**

(Emphasis added.)

PLAINTIFF'S SECTION 306 CLAIM

24. CSXT restates by reference the allegations of paragraphs 1 through 23 of this complaint.

25. CSXT is a "common carrier by railroad" within the meaning of Section 306(1)(d).

26. CSXT's principal competitors are motor carriers and water carriers.

27. Ships and barges are not subject to any Alabama sales and use taxes on their purchase and consumption of petroleum products used for transportation purposes other than for intrastate transportation, which is *de minimus*.

28. Motor carriers are not subject to sales and use taxes on their purchase or consumption of petroleum products used for transportation purposes.

29. The imposition of Alabama sales and use taxes on CSXT's purchase and consumption of diesel fuel and gasoline used for rail transportation purposes is discriminatory and unlawful under Section 306(1)(d) where motor carriers and water carriers are not subject to sales and use taxes on their purchase and consumption of diesel fuel and gasoline used for transportation purposes.

30. CSXT is being required to pay taxes in violation of Section 306(1)(d) by the Commissioner. CSXT has ceased to pay this discriminatory and illegal tax. By letter dated January 2, 2008, CSXT notified the Alabama Department of Revenue and several local jurisdictions that it would not be paying further sales and use taxes on diesel fuel purchases because of recent federal precedent finding such taxes violative of Section 306. CSXT has reasonable cause to believe that the Commissioner will violate

Section 306(1)(d) by bringing proceedings to assess and enforce payment of the tax.

31. Unless the Department and the Commissioner, and all those acting in concert or participating with them are preliminarily and permanently enjoined from assessing, levying, or collecting sales and use taxes from CSXT or from CSXT's vendors on CSXT's purchase and consumption of diesel fuel and gasoline for rail transportation purposes, CSXT will be compelled to pay substantial discriminatory taxes wrongfully imposed in violation of Section 306(1)(d).

WHEREFORE, CSXT requests that this Court:

(1) Preliminarily and permanently enjoin the defendants, and all those acting in concert or participating with them, from assessing, levying, or collecting sales and use taxes from CSXT or from any person paying on behalf of CSXT on its purchase or consumption of diesel fuel and gasoline for rail transportation purposes; and

(2) Preliminarily and permanently enjoin the defendants, and all those acting in concert or participating with them, from instituting any proceedings to assess, levy, or collect any amount of sales and use taxes, interest, or penalties that the defendants might assert to be due and owing from CSXT on its purchase or consumption of diesel fuel and gasoline for rail transportation purposes; and

(3) Declare that defendants' imposition of Alabama sales and use tax on CSXT's purchases or consumption of diesel fuel and gasoline for rail

transportation purposes violates Section 306(1)(d); and

(4) Award plaintiff its costs and such further equitable relief to which it may be entitled.

Respectfully submitted,

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By:/s/ J. Forrest Hinton
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that the foregoing has been served upon the following by the CM/ECF electronic filing system or by depositing a copy thereof in the United States mail, properly addressed and postage prepaid, this _____ day of _____, 2011:

Margaret Johnson McNeill
Assistant Attorney General
State of Alabama and Assistant Counsel
Department of Revenue
P.O. Box 320001
Montgomery, Alabama 36132-0001

---

* * *

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976
Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a

political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and

declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that —

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an

assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term —

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation:

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or

which is owned by the National Railroad Passenger Corporation.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORATION, INC.,

Plaintiff,

v. Case No. 2:08-cv-00655-AKK

ALABAMA DEPARTMENT OF REVENUE and JULIE P. MAGEE, Commissioner of the Alabama Department of Revenue,

Defendants.

AGREED AND PROPOSED FACTS AND PROPOSED CONCLUSIONS OF LAW

Pursuant to Exhibit A, Paragraph 6 to this Court's Pretrial Order entered on February 21, 2012, counsel submit the following agreed facts and principles of law, along with the parties' submission of facts and conclusions of law upon which agreement was not reached.

A. AGREED FACTS

1. Plaintiff CSX Transportation, Inc. ("CSXT") is a Virginia corporation with its principal place of business located in Jacksonville, Florida. CSXT is engaged in interstate commerce as a common carrier by railroad. (Complaint, ¶5.)

2. The Alabama Department of Revenue ("Department") is the department of the State of

Alabama charged with the responsibility to administer and collect taxes within Alabama, including the administration of sales and use taxes. (Complaint, ¶6.)

3. Defendant Julie P. Magee is the Commissioner of Revenue of the State of Alabama ("Commissioner"), and is named in this action in her official capacity only. As Commissioner, Ms. Magee exercises general supervision over administration of the assessment and taxation laws of Alabama, including those imposing sales and use taxes. (Complaint, ¶7.)

4. Generally, Alabama imposes sales tax on the gross receipts from the business of selling at retail or renting tangible personal property, or of furnishing entertainment. (Complaint, ¶8.)

5. The sales tax is collected by retailers, including operators of places of amusement, but is actually imposed on the consumer. *See* Ala. Code §40-23-26(c).

6. The Commissioner, acting through the Alabama Department of Revenue, collects and administers Alabama sales and use taxes. (Complaint, ¶12.)

7. Railroads are subject to sales or use tax on either their purchase or consumption or use of diesel fuel in this State. The tax is imposed by the State at the rate of 4%. (Complaint, ¶14.)

8. Under Alabama law counties and municipalities may impose sales and use taxes which correspond to and parallel the sales and use tax imposed by the state. The rates imposed by the counties and municipalities are in addition to the 4%

rate imposed by the State of Alabama. The counties and municipalities are required by state statute to conform their rules, regulations and procedures for the administration of sales and use taxes to the rules, regulations and procedures adopted by the Alabama Department of Revenue. Ala. Code §§11-3-11.2 and 11-51-200 through 204; Ala. Code § 40-12-4.

9. CSXT holds a direct pay permit issued by the Department. (Complaint, ¶15.) Under a direct pay permit, vendors of CSXT do not collect the sales tax from CSXT and then remit the taxes to the DOR and to the local counties and municipalities; instead, CSXT files sales and use tax returns and pays the taxes directly to the DOR and to the local counties and municipalities.

10. The principal competitors to rail carriers in the transportation of property in interstate commerce in the State of Alabama are on-highway motor carriers of property in interstate commerce ("motor carriers") and carriers of property in interstate commerce by ships, barges and other vessels ("water carriers"). Air carriers also are engaged in the transportation of property in interstate commerce in the State of Alabama, but only marginally compete with rail carriers due to the relatively small size and weight of the property transported by air carriers. (Complaint, ¶16.)

11. Water carriers are exempt from sales or use taxes on their purchase or consumption of diesel fuel in the State of Alabama used for interstate transportation. (Complaint, ¶18.)

12. Fuel costs incurred in the transportation of property in interstate commerce are a major annual

operating expense of rail carriers, motor carriers and water carriers. (Complaint, ¶19.)

13. CSXT is a "common carrier by railroad" within the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501. (Complaint, ¶22.)

14. Motor carriers are not subject to sales and use taxes on their purchase or consumption of petroleum products used for on-road transportation purposes.

15. Ships and barges are not subject to any Alabama sales and use taxes on their purchase and consumption of petroleum products used for transportation purposes other than for intrastate transportation. (Complaint, ¶24.)

16. The following are the current sales and use tax rates imposed by cities and counties on CSXT's purchase and use of diesel fuel:

City of Birmingham	4%
City of Mobile	4%
City of Montgomery	3.5%
County of Jefferson	2%
County of Mobile	1%
County of Shelby	1%
County of Montgomery	2.5%
County of Jackson	2%
City of Bridgeport	3%

17. According to Freight Analysis Framework, an analysis of freight movement published by the United States Department of Transportation, in the year 2002, 82% of freight moved intrastate within Alabama was transported by trucks, 6% by rail, and

1% of freight moved intrastate within Alabama was transported by water.

18. Interstate motor companies pay a Motor Fuels Excise Tax totaling 19¢ a gallon. Under Alabama Code § 40-17-13, the proceeds of 13¢ per gallon are distributed to the Alabama Department of Transportation for the construction, repair, maintenance, and operation of public roads and bridges, and payment of principal and interest on highway bonds. Under Alabama Code § 40-17-222. the proceeds from the 6¢ per gallon tax are distributed as follows: (a) 4.69% to counties for construction and maintenance of roads and bridges; (b) 0.93% to towns and cities for construction and maintenance of roads and bridges; and (c) the remainder to the Alabama Department of Transportation to be used for highway purposes.

19. For the tax years 2006 through 2010, CSXT paid the following amounts of property taxes to cities and counties in Alabama on its track structure:

2006	$423,860
2007	$436,840
2008	$442,307
2009	$430,578
2010	$454,079

B. PLAINTIFF'S PROPOSED FACTS (NOT AGREED UPON)

20. In 2007, CSXT paid state and local Alabama sales tax of $3,022,291.64 on its diesel fuel,

or an average of 14.19¢ per gallon of diesel fuel it used in Alabama.

21. In 2008, CSXT paid state and local Alabama sales taxes of $5,456,678.72 on its diesel fuel, or an average of 26.9¢ per gallon of diesel fuel it used in Alabama.

22. In 2009, CSXT paid state and local Alabama sales taxes of $2,752,591.23 on its diesel fuel, or an average of 15.69¢ per gallon of diesel fuel it used in Alabama.

23. In 2007, CSXT paid $2,421,791.21 in state and local Alabama sales tax on track and signal material, or 11.37¢ per gallon of diesel fuel it used in Alabama.

24. In 2008, CSXT paid $2,893,680.89 in state and local Alabama sales tax on track and signal material, or 14.30¢ per gallon of diesel fuel it used in Alabama.

25. In 2009, CSXT paid $2,242,667.09 in state and local Alabama sales tax on track and signal material, or 12.78¢ per gallon of diesel fuel it used in Alabama.

26. In the four-year period 2007-2010, CSXT paid more than $10 million in sales and use tax in Alabama on track and signal material.

C. DEFENDANTS' PROPOSED FACTS (NOT AGREED UPON)

27. All taxpayers of the State of Alabama, who do not pay the motor fuel tax, and are not exempt from the sales and use tax by statute, pay the 4%

general rate of sales and use tax on purchase of diesel fuel. Ala. Code § 40-23-2(1).

28. The Department does not act in concert with, nor does it administer, collect, monitor, enforce, or set the rates of sales and/or use tax in the localities where CSXT owes and/or pays local sales and/or use tax on its purchase, use, or consumption of diesel fuel.

29. The localities that CSXT owes/pays sales and/or use tax on it purchase, use, or consumption of diesel fuel in Alabama, i.e., the City of Birmingham, the City of Mobile, the City of Montgomery, the County of Jefferson, the County of Mobile, the County of Shelby, the County of Montgomery, the County of Jackson, and the City of Bridgeport, are not parties to this lawsuit.

30. Currently, CSXT has pending lawsuits against the City of Birmingham, CV-2012-901772, the County of Jefferson, CV-2010-1490, the City and County of Mobile, CV-2010-901129, the City of Montgomery, CV-2010-900652, the County of Montgomery, CV-2010-900648, and the County of Shelby, CV-2010-900461, all regarding refunds of local sales and/or use tax due to alleged discrimination under Section 306 of the Railroad Revitalization and Reform Act of 1976, 49 U.S.C. §11501. ("4-R" Act).

31. Counsel for the Alabama Department of Revenue and Julie P. Magee, Commissioner of the Alabama Department of Revenue, do not represent any of the localities in Alabama that CSXT owes/pays sales and/or use tax on its purchase, use,

or consumption of diesel fuel. All localities are represented by their own counsel.

D. CONCLUSIONS OF LAW

The following are the principles of law that the parties agree are applicable to this case:

1. This is an action brought pursuant to Section 306 of the Railroad Revitalization & Regulatory Reform Act of 1976, now codified at 49 U.S.C. § 11501. This Court has subject matter jurisdiction of this action under 49 U.S.C. § 11501(c) and 28 U.S.C. § 1331 (federal question). This Court has personal jurisdiction over the defendants and venue is proper in this district.

2. The United State Supreme Court has held in this case that 49 U.S.C. § 11501 allows plaintiff CSXT to challenge sales and use taxes that apply to rail carriers but exempt their competitors in the transportation industry. *See* CSX Transportation, Inc. v. Ala. Dept. of Rev., 131 S.Ct. 1101, 1114 (2011).

3. Section 306(1)(d), 49 U.S.C. § 11501(b)(4) prohibits states and their political subdivisions from "impos[ing] another tax that discriminates against a rail carrier." In the above-referenced case, the United States Supreme Court held that this subsection is applicable to the plaintiff's allegations in this case.

E. PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW (NOT AGREED UPON)

4. Congress enacted Section 306 to establish a clear federal policy against discriminatory state

taxation of railroads and to create an efficient federal judicial remedy to enforce such a policy against the states. *See* Southern Railway Co. v. State Board of Equalization, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Atchison, Topeka & Santa Fe Railway Co. v. Board of Equalization, 795 F.2d 1442, 1443, n.2 (9th Cir. 1986), *vacated on other grounds*, 828 F.2d 9 (9th Cir. 1987), and authorities cited therein.

5. The overwhelming weight of authority holds that Section 306(1)(d), 49 U.S.C. § 11501(b)(4) prohibits a tax on railroad diesel fuel that is not imposed on the fuel of competing transportation modes. *See, e.g.*, Union Pacific Railroad Co. v. Minn. Dept. of Rev., 507 F.3d 693 (8th Cir. 2007); Burlington Northern, Santa Fe Railway Co. v. Lohman, 193 F.3d 984 (8th Cir. 1999); *cert. denied*, 529 U.S. 1098 (2000); Kansas City Southern Railway Co. v. Bridges, 2007 WL 977552 (W.D. La., March 30, 2007).

6. These same authorities hold that when considering whether a tax on railroad diesel fuel violates Section 306(1)(d), the appropriate comparison class to determine whether discrimination exists is the class of competitive modes of transportation. *Id.*

7. Section 306 establishes a rule to prevent tax discrimination. The overwhelming majority of cases have held that the proper role of the court is to focus only on the tax at issue – here, the sales and use tax – and not to consider other taxes or the overall tax burden of the railroads as compared to railroad competitors. As the Fifth Circuit has observed:

"Determining the intrinsic economic fairness of a tax system to a particular taxpayer is a paradigm of the kind of polycentric problem for which courts are ill-suited." *See* Kansas City Southern Railway Co. v. McNamara, 817 F.2d 368, 375-77 (5th Cir. 1987). *See also* Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979).

8. The proof has shown that the defendants, and those acting in concert or participation with them, impose sales and use taxes on the purchase and consumption of CSXT's diesel fuel used for transportation purposes, when the defendants and those acting in concert or participation with them do not impose sales and use taxes on the purchase and consumption of diesel fuel by the principal competitors of railroads, mainly motor carriers and interstate water carriers. The imposition of these taxes violates 49 U.S.C. § 11501(b)(4). *See* Union Pacific Railroad Co. v. Minn. Dept. of Rev., *supra*; Burlington Northern, Santa Fe Railway Co. v. Lohman, *supra*; Kansas City Southern Railway Co. v. Bridges, *supra*.

9. Section 306(2) of the Railroad Revitalization & Regulatory Reform Act of 1976, 49 U.S.C. § 11501(c), authorizes the federal judiciary to grant such injunctive relief and declaratory judgment as may be necessary to prevent, restrain, and terminate any acts in violation of Section 306, and thus authorizes the injunctive and declaratory relief sought by the plaintiff in this case.

F. DEFENDANTS' PROPOSED CONCLUSIONS OF LAW (NOT AGREED UPON)

10. Congress' purpose in adopting the Railroad Revitalization and Reform Act of 1976, 49 U.S.C. §11501 ("4-R Act") was not to grant the railroads preferential treatment, but to "remedy discrimination against the railroads and place them on an even playing field with other state taxpayers." *See* Atchison, Topeka, and Santa Fe Ry. v. State of Ariz., 78 F. 3d 438, 442 (9th Cir. 1996), *citing* Ogilvie v. State Board of Equalization, 657 F.2d 204, 210 (8th Cir. 1981) cert. denied 454 U.S. 1086, 102 S.Ct. 644 (1991). Therefore, a tax will be discriminatory under subsection (b)(4) of the 4-R Act "if it imposes a proportionately heavier tax on railroading than on other activities." *Id.* at 441, *quoting* Burlington N.R.R. v. City of Superior, 932 F.2d 1185, 1187 (7th Cir. 1991).

11. The sale or consumption of petroleum products in Alabama is generally subject either to the various excise taxes imposed by Title 40 Chapter 17 of the Alabama Code ("motor fuels tax"), or to sales and use taxes imposed by Title 40, Chapter 23 of the Alabama Code ("sales and use tax"). Fuel subject to the motor fuels tax under Title 40, Chapter 17 is not subject to sales and use taxes under Title 40, Chapter 23. Because the purchase and consumption of diesel fuel by railroads is not subject to motor fuels tax, railroads are subject to sales and use tax.

12. CSXT's main competitors, on-road motor vehicles ("motor carriers"), are subject to the 19 cents per gallon motor fuel tax on their purchases of diesel fuel. *See* Ala. Code §§40-17-2(1) (13 cents per gallon) and 40-17-220(e) (6 cents per gallon). Because

railroads do not pay the motor fuels tax on their purchases of diesel fuel, these purchases are taxed at the lower 4% general rate of sales and use tax. *See* Ala. Code § 40-23-2(1). Other off-road carriers, i.e., ships, barges and other vessels engaged in interstate commerce ("water carriers") are exempt from sales or use tax, but not all excise taxes, on their purchase or consumption of diesel fuel in this State. The exemption from sales tax requires that a vessel travel to a foreign port to be deemed to be engaged in international or interstate commerce. Water carriers engaged in intrastate commerce are subject to Alabama sales and use tax on purchases of fuel used for intrastate transportation purposes. Ala. Code §§ 40-17-2(1) and 40-17-220(e) (motor carriers-motor fuels tax), 40-23-4(a)(10) (water carriers-sales tax) and 40-23-62(12) (water carriers-use tax) (2003 Repl.)

13. In this case, the United States Supreme Court stated in its dissenting opinion that "the best way to read [§11501] (b)(4) is as prohibiting taxes that target or single out railroads as compared to general commercial and industrial taxpayers." CSX Transp., Inc. v. Alabama Dept. of Revenue, 131 S, Ct. 1101, 1120 (2011) (Thomas, J., Ginsburg, J., dissenting).

14. In an unpublished opinion, the United States District Court for the Middle District of Alabama ruled in favor of the Department on almost identical issues as those raised by CSXT in the instant case. Burlington Northern Santa Fe Railway Company v. H.E. Monroe, Commissioner of Revenue of the State of Alabama, Case No. 97-D-1754-N

(August 10, 1998). The District Court determined the proper comparison class to be other commercial and industrial taxpayers and found that as a generally applicable tax, the Alabama sales and use tax did not discriminate against railroads in violation of the 4-R Act. Monroe pp. 21-25. In reaching this holding, the District Court devoted almost seven (7) full pages to an analysis of Alabama's excise tax structure pertaining to fuel and recognized that certain industries and entities which were the railroads' competitors were exempt from sales and use tax, namely motor carriers, water carriers and air carriers, but the fact that the State of Alabama's tax structure allowed for certain exemptions, which did not include railways, did not result in discriminatory treatment of the railways in violation of the 4-R Act. Monroe pp. 2-8, 22-25.

15. Because the key issue in this case is whether rail carriers are put at a competitive disadvantage by the taxes they pay, the taxes paid by rail carriers as opposed to those taxes levied upon other taxpayers, specifically their competitors, is germane. In order to determine whether CSXT is being targeted or singled for discrimination, the test as opined by the dissent in CSX Transp., Inc., Alabama's entire excise tax structure that applies to the subject of the tax (use or consumption of diesel fuel), regardless of descriptive labels, must be examined. Therefore, both Alabama's sales and use taxes imposed by Title 40, Chapter 23, and the various fuel excise taxes as set out in Title 40, Chapter 17 must be considered. *See* Atchison, Topeka, and Santa Fe Ry. v. State of Ariz., 78 F. 3d

438 (9th Cir. 1996); Burlington Northern Railroad Company v. Commissioner of Revenue, 606 N.W. 2d 54 (Minn. 2000).

16. After a comparison of the foregoing taxes imposed on rail carriers, motor carriers, and water carriers, the Court finds that the sales and use tax paid by rail carriers does not target or single out railroads for discrimination, as rail carriers do not pay disproportionate amount of taxes in comparison to other commercial and industrial taxpayers. In fact, Alabama's overall excise tax structure results in roughly equal treatment of all these carriers, and does not put rail carriers at an overall competitive disadvantage.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CSX TRANSPORTATION, INC.,	CASE NO.: 2:08-cv-00655-AKK
v.	Honorable Abdul K. Kallon
ALABAMA DEPARTMENT OF REVENUE, et al.,	April 25, 2012
Defendant.	Birmingham, Alabama

BENCH TRIAL

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* * *

[14] VICKIE J. FRIEDMAN,

duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. McBRIDE:

Q. Thank you, Ms. Friedman. By whom are you employed?

A. I'm employed by CSX Transportation, Inc.

Q. And in what capacity?

A. I'm the director of sales and use taxes.

Q. And could you tell us, in that position as director of sales and use taxes, what are your duties generally?

A. Sure. I oversee all aspects of sales and use tax for CSX Corporation and all their subsidiaries. The primary purpose is tax compliance and audit work. We file sales tax returns in 27 states. That's about 150 returns per month. We also process Canadian tax returns and some fuel transporter returns, which are informational returns, as well as handle all of the sales and use tax audits that [15] rotate through my department on an annual basis.

Q. And does that include filing returns for various localities and jurisdictions?

A. Yes, it does. We file local returns in the State of Alabama and Louisiana.

* * *

[16] Q. And are you generally familiar with CSXT's payment of sales taxes within Alabama and other jurisdictions?

A. Yes, I am.

Q. Let's talk about Alabama for a moment. Could you tell us how CSX pays sales taxes on diesel fuel in Alabama.

A. Sure. We look at the transaction when we purchase a gallon of dyed diesel, which is off-road diesel. A sales tax is due on the purchase of that gallon of fuel. Now, we are a large taxpayer in Alabama, and we have a direct-pay permit. So my department actually determines the taxable basis, and then we apply the correct state sales and use tax that's due on every transaction that we buy on a monthly basis. And that includes fuel and any tangible personal property or taxable services.

Q. Okay. And if I understand correctly, this direct-pay permit, that just allows you to buy material free of tax, and you actually have the responsibility of reporting that [17] monthly to the State of Alabama?

A. Yes, it shifts the burden from our vendors to us because we know our business better than our vendors. So we can look at the transactions and determine whether that's a taxable transaction and then apply the correct tax rate or exempt it under the different state laws.

Q. And does that apply additionally with respect to the local taxes?

A. Yes.

Q. Now, with respect to your diesel fuel, are there both -- is there both a state rate, and are there local rates applicable to that diesel fuel?

A. Yes, there is.

Q. For example, just so the Court will have an idea -- I think some of these are in stipulated facts.

But in Birmingham, what would be the combined local and state rate on the purchase of diesel fuel here in Birmingham, Jefferson County?

A. Okay. Birmingham is our largest facility in Alabama, and the combined sales and use tax rate is 10 percent. That's broke out between 4 percent for the state, 2 percent for Jefferson County, and 4 percent for the city of Birmingham.

Q. And is it your understanding that the interstate truckers are subject to the sales tax on diesel fuel?

[18] A. No, they are not.

Q. And do you know what tax they are subject to?

A. Sure. When you buy clear diesel, you pay the 19 cent per gallon motor fuel tax, and that's designed to go into the Highway and Bridge Fund.

Q. Okay. And are you familiar with the way interstate water carriers are taxed here?

A. Yes.

Q. Tell me about that.

A. They do not pay the sales tax or the motor fuel tax on their fuel.

Q. Now, I want to put this a little bit in context if we may. Do you recall that in February of 2011, Judge Kallon reinstated the injunction in this case?

A. Yes, I am.

Q. And since that time, tell the Court how you dealt with the sales tax liability on diesel fuel.

A. Sure. The injunction established an escrow account where we have been paying our sales and use taxes due on each gallon of fuel on a month-to-

month basis. It's with the Bank of New York Mellon. And we make a payment every month.

Now, the calculation is exactly the same. We still calculate the taxable base of each gallon of fuel, apply it to the state, county, and city rates, but we make one [19] lump-sum payment into the escrow account on behalf of all the different jurisdictions that the money would be due to.

Q. Okay. And give me an idea, if you will, generally speaking how much money is in that escrow account now.

A. Sure. The escrow account is for the tax periods of February of '11 through February of '12, and it's just over 6.8 million dollars.

Q. And that's about how much a month?

A. We run between 550 and 575 thousand dollars per month on our sales tax liability.

Q. Okay, I want to be sure I heard you correctly. That includes the amount of taxes that would be due both to the localities and to the state?

A. Correct.

[20] Q. (BY MR. McBRIDE:) Now, Ms. Friedman, do you have a copy of what's marked Exhibit 1?

A. I do.

Q. And could you identify that for me, please?

A. Sure. I created an exhibit. The starting point was the state exhibit of the comparison of sales taxes paid on dyed diesel fuel versus the motor fuel tax.

Q. And is that state exhibit somewhere in this particular document?

A. Yes, I believe it's Exhibit 7.

[21] Q. That would be tab 7.

A. Tab 7, I'm sorry.

MR. McBRIDE: Tab 7, your Honor.

Q. And tell me again what this tab 7 is?

A. Tab 7 is that state exhibit that compares the 4 percent state sales tax on dyed diesel fuel to the motor fuel tax on clear diesel fuel.

Q. Okay. And then at my request or at counsel's request, did you prepare some other documents that worked off of this particular exhibit here?

A. Yes, I did.

Q. Let me ask you. Is there something in your -- from your understanding, is there something missing from this document?

A. Sure. The first problem I have with this is that it only looked at the state sales tax per gallon. And as we mentioned before, Birmingham is a 10 percent combined rate. It's only picking up about 40 percent of our sales tax expense.

Q. Okay. And are there other things, if you were going to make a burdens analysis, are there other things that ought to be looked at in order to come up with a correct comparison?

A. Yes. I would think that we would have to -- since the motor fuel tax is designed to fund the bridges and highways, [22] the railroad completely constructs, maintains, and builds our own infrastructure, and we pay tax on that infrastructure. So I also thought that the tax expense on our infrastructure should also be included in the chart because that's a tax expense that the railroad incurs.

Q. And when you say you pay tax on the infrastructure, you mean the property tax?

A. Yes, a property tax on the infrastructure and then as well as sales tax on the parts and material that go into building the infrastructure.

Q. Okay. Now, let me ask you to look at tab 6 of that and just generally tell me what that tab 6 is.

A. Sure. Tab 6 is my Excel spreadsheet. The starting point, like I said, was the state exhibit. But I started with their data and then added the additional columns of information that I thought would be relevant to this comparison.

MR. McBRIDE: Your Honor, we've broken down this particular spreadsheet, tab 6, and are able to put it up on the screen --

THE COURT: You may.

MR. McBRIDE: -- in pieces so that you could look at it and counsel could look at it in pieces so it's not quite so difficult to look at it. If we could have your Honor's permission to put that up on the screen.

[23] THE COURT: You may.

Q. (BY MR. McBRIDE:) Do you have that on your screen?

A. I do.

MR. McBRIDE: Do you have that on your screen?

MS. McNEILL: Uh-huh.

MR. McBRIDE: Seems like everybody has it on their screen but me, your Honor. But I'll probably --

THE COURT: Hit the screen and see if that resets it by any chance.

MR. McBRIDE: Now, your Honor, you can follow this along either in paper form on tab No. 6 or on the screen with it broken down, whichever is easier.

Q. But I'm going to ask you to take the Court through this exhibit, Ms. Friedman, and tell us about tabs A through D of this particular chart.

A. Sure. A through D came exactly from the state exhibit. So it should tie to their columns A through D. But it's a three-year period of time from January of '07 through December of '09. Column B is the average issue price per gallon of fuel. Column C is that issue price times 4 percent; so the state portion of the sales tax rate. And then column D is combining the average issue price plus the 4 percent state sales tax.

Q. Okay. And that's identical to the state's exhibit?

A. Yes, it is.

[24] Q. Okay. Let's go to the next group. That would be columns E, F, and G. Tell us what you did there.

A. I actually inserted a column to put in the local sales and use tax expense. So column E is just a repeat of the state 4 percent tax rate. Column F is the average tax rate per year. And that's basically calculated on the total amount of tax that we paid all the jurisdiction broke out between the 4 percent state and then the remaining part that was the local piece, to come up with the local tax expense per gallon on a pennies-per-gallon basis, and that's column G.

Q. Okay. And it would be possible, I gather, to add some of the columns up and come up with the total amount of sales and use tax expense that you had with respect to the purchase of a gallon of diesel fuel; is that right?

A. Sure. If you added E and G together, that's the total amount of tax that my department self-assessed and paid on each gallon of fuel that we purchased.

Q. Okay. So for example, if I looked down to April of '08, would I be correct that the 4 percent rate based on the price of fuel was 13.02 cents; is that right?

A. For the state, yes.

Q. And that the local rate is 18 cents; is that right?

A. Correct.

Q. And that would be a total of 31 cents that you would [25] have paid for a gallon of diesel fuel at that time?

A. Yes.

Q. Okay. All right. Let's move on to the next group of columns, and that's columns H and I. Tell the Court what you're doing here.

A. This goes under the logic that the truckers have their infrastructure paid for by the motor fuel tax. So I put our tax expense that we paid on the infrastructure, the railroad, for property tax and then also for the sales tax on the track and signal material that we use to build the infrastructure. Both columns are calculated the same way. It's the annual tax expense divided by the total number of gallons of fuel that we purchased in that calendar

year, to come up with the tax expense per year per category.

Q. Okay. And that's not something you actually paid with relationship to a gallon. You just converted those costs into a cents per gallon; is that right?

A. Correct.

Q. And with respect to that sales tax expense on track and signal material, would that be for laying rails and ties and those sort of things?

A. Yes, it is. I ran a query on our track and signal material. So that would be rail, steel, ballast, cross ties, crossing arms, the signal lights, things like that that are all taxable in Alabama for sales tax, and then [26] determined how much money we self-assessed and paid on those purchases each year.

Q. Okay. Let's put up the next group, I think. which would be I through -- I'm sorry. We got I through N there. Let's take the next group.

A. K through N?

Q. That would be L through... yeah, take us through that next group, please.

A. The next group I have is K through N.

Q. Okay.

A. And that's basically the math of all the prior columns. K is the total -- I refer to it as like the all-in cost. That's the cost of a gallon of diesel fuel and all the related tax expenses of the sales tax for state and local plus the sales tax on the -- or the property tax expense per gallon of gas and the sales tax on track and signal. That's column K.

And then column L, I removed the purchase price of the fuel so that ultimately I would compare

the cost of our tax burden to their tax burden. So L is removing the average cost of a gallon of fuel. M is just the tax expense. And then N is just to look at it at a year-over-year comparison of what our average tax expense was each year.

Q. Okay. And then let's go to the final group, which is O through S, and get you to tell us about that, please.

[27] *A.* Okay. O through S goes back to the state exhibit. At least the first two columns are the state exhibit. That's the motor fuel tax of 19 cents. And then column P is the total cost of a gallon of fuel plus the 19-cent motor fuel tax.

Q is I removed the purchase price of the diesel fuel so we could look tax to tax. And column R comes back to that 19 cents per gallon of fuel. And then S does a yearly average.

Q. Okay. And your yearly average is 19 cents?

A. It remains consistent year over year.

Q. Okay. Now, Ms. Friedman, in the interest of full disclosure, are there some local taxes that perhaps should be added in columns O through S?

A. Sure. I want to make sure I say I'm not trying to compare the sales tax to the motor fuel tax. But if I were looking at the motor fuel tax, I would also want to include the locally administered motor fuel taxes. Those are very, very hard to come by because they're kind of buried in different places. So I looked at the city of Birmingham to determine what that tax expense would be since that's our largest fueling facility. In Birmingham, they don't actually impose a motor fuel tax on their on-road diesel, but --

Q. You mean the city?

[28] *A.* The city of Birmingham. But the county of Jefferson does impose a 1-cent-per-gallon motor fuel tax.

So if you were looking at this Birmingham to Birmingham, I would have moved column R up to 20 cents per gallon.

Q. Okay. Now, let me ask you to turn to tab 3 in Exhibit 1.

MR. McBRIDE: And your Honor, may we put those up? Those are simply some charts that we -- she's translated those into some graphic representations.

THE COURT: You may in fact publish by video as well.

Q. (BY MR. McBRIDE:) Ms. Friedman, if you will, tell us about those two charts that are behind tab 3 of Exhibit 1.

A. Sure. It's just a graphic representation of my spreadsheet. The first chart is the average annual tax burden on the railroad versus the trucks. So it would be 30 cents versus 19 for 2007, 45 versus 19 for '08, and 31 versus 19 for 2009. And those numbers tie to the spreadsheet.

Q. Okay. And what about the second page of that chart? Tell us about that.

A. The second chart is the exact same information except looking at it as a month-to-month comparison. Because our sales tax is 10 percent of the purchase price of a gallon of fuel, our costs fluctuate based on the coast of a gallon of [29] fuel. So I wanted to make sure you saw the up-and-down of our costs compared to the economy and the cost of diesel fuel compared to the trucks.

Q. Now, I just wanted to be sure I'm clear. You're not suggesting for purposes of this case making these kind of comparisons; is that correct?

A. Correct. I'm not trying to say we should compare sales tax to motor fuel tax. What I'm saying is if you're going to look at the state exhibit, you have to look at our other expenses that are also similar to the motor fuel tax.

MR. McBRIDE: Okay.

Your Honor, we would at this time move Plaintiff's Exhibit 1, and we have no further questions of Ms. Friedman.

THE COURT: Plaintiff's 1 is received over defendant's objections which are fully noted of record.

(Plaintiff's Exhibit 1 admitted into evidence.)

THE COURT: Ms. McNeill, are you the one responsible to cross-examine this witness, or is it your co-counsel, Mr. Maddox?

MS. McNEILL: It's me.

THE COURT: You may proceed.

CROSS-EXAMINATION BY MS. McNEILL:

Q. Ms. Friedman, are you aware that motor carriers do pay sales tax on dyed diesel fuel?

A. I'm not aware.

[30] Q. Okay. You prepared this analysis, and you're not aware of motor carriers paying sales tax for -- when they go off road?

A. I did not look into that.

Q. Okay. Are you aware that water carriers pay sales tax when they travel intrastate?

A. Yes.

Q. All right. So your testimony earlier that water carriers didn't pay sales tax was incorrect?

A. The agreed facts said that --

Q. Yes or no?

A. Correct.

Q. Okay. Are you aware, and I believe you did state that there are local motor fuel taxes as well?

A. Yes.

Q. And you didn't think that important enough to include in your analysis?

A. Like I mentioned, they're hard to determine. I didn't look it up.

Q. But you were responsible for preparing this detailed report, and you didn't think it important to find out what the local taxes are, motor fuel taxes are?

A. No, I was just taking your exhibit and expanding it --

Q. All right, my question is you prepared this, and you added in the locals. My exhibit was only the state 4 [31] percent. You went and added the local sales tax, but you didn't think it important enough to find out local motor fuel taxes rate except in Birmingham; is that correct?

A. I have no way of determining who pays what in what state or city.

Q. Okay. Except Birmingham, apparently?

A. Correct. I looked into Birmingham.

Q. Okay. Are you aware that trucking businesses pay property tax on their property like the railroads?

A. I am not a property tax person.

Q. But you included it in your analysis that the railroads pay property tax. Did you not think it important to include that trucking businesses also pay property taxes on their property?

A. I calculated the property tax on CSX's infrastructure.

Q. And didn't include anything about whether a trucking business would pay it?

A. No.

Q. All right. Does CSX own their tracks?

A. Yes.

Q. So it's private property, correct?

A. Yes.

Q. Okay. Did you take into account the cost of compliance truckers have to bear in order to be regulated in Alabama?

A. No.

[32] Q. Are you aware that truckers have to pay sales tax on their tangible personal property as the railroads are?

A. I'm aware of the law. I did not look into it.

MS. McNEILL: All right. Thank you.

THE COURT: Before Mr. McBride comes back up, the property taxes that I guess you mentioned earlier, columns H and I, I believe, those include I guess the property taxes on the rail tracks that CSX owns?

THE WITNESS: Yes, sir.

THE COURT: Okay. This may be going off the deep end, but because they're private tracks, does that mean that if other rail carriers use them, CSX charges them a fee for use? I don't know if you even

allow other carriers to use your tracks or not. I'm clearly stepping out of my comfort zone.

THE WITNESS: I don't know the full answer to that.

THE COURT: Okay.

THE WITNESS: I'm sorry.

THE COURT: That's fine.

THE WITNESS: I don't know the details of that.

THE COURT: Mr. McBride, you may resume with your redirect.

MR. McBRIDE: I just have a couple of questions.

REDIRECT EXAMINATION BY MR. McBRIDE:

Q. When I asked you about water carriers, Ms. Friedman, I [33] asked you specifically about interstate water carriers, did I not?

A. Yes.

Q. And your answer was about interstate water carriers; is that right?

A. Correct.

Q. And in fact, just so we can be clear, when you looked at and put on your chart the sales taxes that were paid with respect to the infrastructure, you were only putting on there the taxes paid with respect to rail and ties and ballast and those sort of things, right?

A. Correct.

Q. But the railroad actually pays a lot more sales tax, does it not, other than those items?

A. Sure we do.

Q. And have you ever heard of a truck paying any sales tax for the repair of a highway?

A. I wouldn't know that; I'm sorry.

* * *

[34] RICHARD R. MUDGE, Ph.D.,

duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. McBRIDE:

Q. Dr. Mudge, good morning. Did you prepare a report in this case?

A. Yes, I did.

Q. And I will say that that item is marked Exhibit 2. Do you have a copy of that report with you?

A. Yes, I do.

MR. McBRIDE: Your Honor, I'm going to be referring to Exhibit 2.

(Plaintiff's Exhibit 2, Mudge report, marked for [35] identification.)

Q. Does that report contain a copy of your vita at the end?

A. Yes, it does.

Q. First of all, before we go too far, I want to get something cleared up. Is there something in your particular report that needs to be corrected at this time so it will be consistent with the agreed facts?

A. Yeah. There's a -- I have an Appendix B which describes the property taxes paid by CSX. And I believe the correct numbers are slightly larger, four or five thousand dollars per year larger than the numbers I had. The numbers I had were from CSX that were somewhat preliminary.

Q. Okay. So the numbers that appear in your report are a little bit less than the numbers that are actually agreed to in this case?

A. Yes.

Q. Okay. Now, could you tell me by whom you're employed?

A. I work for Delcan Corporation.

Q. And please tell the Court what Delcan Corporation is.

A. Delcan is a transportation consulting firm. The firm has been in business about 60 years. We have 800 employees. I run the management consulting group of Delcan. And that involves work for state departments of transportation, for the U.S. Department of Transportation, as well as for think [36] tanks around in Washington, D.C. mainly.

One example is we just completed the long-term statewide plan for Texas DOT. Did a similar one for Arizona DOT. My role on those projects is to focus on the economics and finance of the long-term plan. Do a lot of work for U.S. Department of Transportation on a variety of economic and financial aspects.

Q. And could you describe for the Court your educational background.

A. Yeah, I have an undergraduate degree from Columbia College in New York City. I have a Master's and Ph.D. from the University of Pennsylvania in regional economics with a focus on transportation.

Q. Okay. And just briefly describe your employment history.

A. Yeah. After I graduated from the University of Pennsylvania, I worked for the Rand Corporation in the city of New York and ran their economic development and transportation group. I then worked for the Congressional budget office, which provides advice to U.S. Congress. I was there for about 10 years and ran their transportation policy group.

After that, I established my own consulting firm, Apogee Research, which focused on economics, finance, and policy within transportation. I later sold that firm. For [37] the past 10 years, I've been working for Delcan Corporation.

Q. Okay. And can you tell the Court just generally about some of your publications and speaking engagements?

A. Yes. They vary widely.

I finished a report recently for Bipartisan Policy Center in Washington, D.C. that looked at the economic performance measures for transportation, completed a report on mileage-based user fees for trucks. This was done for several jurisdictions in the state of New York and as well as the U.S. Department of Transportation.

For the Washington state auditor's office, prepared an analysis of congestion performance in the state of Washington. Previously when I was at the Congressional Budget Office, we did a number of publications. I was coauthor on the guidelines for highway cost allocation which reviewed how do you determine how much money different vehicles should pay for the use of the highway system, and while at

CBO prepared a number of reports on user fees including for the highway system.

I speak on a fairly regular basis, mainly on finance of transportation, probably two or three times a year. A lot of these presentations are for something called the Transportation Research Board, which is an arm of the National Academy of Sciences.

I'm also an invited member of the Congestion Pricing [38] Committee of the Transportation Research Board. And this is a group that looks at alternative ways of financing transportation.

Q. And have you had occasion to testify in the past?

A. Several times. I was an expert witness for the Department of Justice in a case involving truck engines and cost of environmental rules. In that case, I prepared an expert report and then a counter-report to the report prepared by the other side. That case never went to trial, though the Department of Justice was successful.

I also appeared as an expert witness for the Minnesota Department of Transportation in valuing state highway rights-of-way. And I prepared -- appeared as an expert witness in a private case involving transportation patents.

Q. And how about any Congressional testimony when you were at CBO?

A. When I was at CBO, I supported or co-testified in about a dozen different testimonies before the transportation authorizing committees, transportation appropriations committees, and transportation budget committees.

Q. Okay. Before we go any further, Dr. Mudge, could you give the Court just a brief overview of what your testimony is going to be here today?

A. Certainly. Testimony focused on the excise taxes that the -- on diesel fuel that the trucking industry pays and [39] contrast that with the sales taxes paid by the railroad industry in the state of Alabama.

The excise taxes have a long history in the U.S. of funding the construction of -- construction, maintenance, and operations of the highway system. In most states they are a dedicated user fee. They are restricted -- use is often restricted to just construction of the highway system.

This use is something that is logical because it makes sense for users to pay for what they benefit from. It reflects basic economic principles, and it's been written into -- mandated by law in most states as well as at the federal level.

In terms of economic jargon, it's called a benefit tax. Basically, that says that he or she who benefits from a particular expenditure should pay for it; that if you don't benefit from it, you shouldn't pay for it.

A good example of how the excise taxes on diesel fuel are a benefit tax is the fact that the American trucking associations have asked that the federal diesel taxes be raised as long as the money is dedicated to expenditures on highways. And having lived in Washington, D.C., it is unusual to hear a group that says please raise our taxes. And this is in contrast to the sales tax on diesel fuel that the railroads pay in Alabama.

Q. Okay. In order to get a little context, could you, [40] without going into too much detail, kind of discuss the history of highway funding in the U.S.

A. Certainly. When I was at the Congressional Budget Office, my group prepared a paper on the history of highway finance because it's something that not everybody is fully aware of.

The first motor fuel tax in the U.S., tax on motor fuel in the U.S. was imposed by the state of Oregon more than 90 years ago. At the federal level, there's a piece of legislation called the Hayden-Cartwright Act which was passed in 1934. That act said it was unjust and unfair for motor carriers and travelers in general to pay a motor fuel tax unless that money was dedicated to the construction and maintenance of the highway system. And in fact, that act mandated that states dedicate any motor fuel taxes they had to the use of the highway system.

The other landmark legislation is in 1956, Congress passed the -- approved the Highway Trust Fund. This involved tripling the tax on motor fuel. This money was dedicated to the interstate construction of interstate highway system and then since then to other highway construction.

Every state has some form of a motor fuel tax. They are to various degrees dedicated to the payment of -- to construction, maintenance, and operation of the highway [41] system in those states.

Q. And have you looked at the motor fuel tax in Alabama?

A. Yes, I have.

Q. And tell me about that.

A. The statewide tax on diesel fuel is about 19 cents a gallon, and it is 100 percent dedicated to the -- let me make sure I get it right. The Public Roads and Bridges Fund.

Q. Now, just to be complete, you probably heard Ms. McNeill raising some questions with Ms. Friedman. Are there some other taxes or fees that the truckers pay in Alabama with respect to roads and highways?

A. Yea, the biggest tax they pay is there's a state registration fee. And that can be as much as $800 per truck for the largest trucks.

There are also some local motor fuel taxes. We mentioned before the 1 cent per gallon within Jefferson County.

Q. Okay. Now, can you contrast these motor fuel taxes with the sales taxes that the railroads pay?

A. They're really not comparable at all because the excise tax is something that's dedicated to the construction and operation of the state highway system and therefore provides a direct tangible benefit to the trucking industry. The state sales tax on the diesel fuel for the railroads [42] provides no such benefit. So one is a net plus for an industry. The other one is a net cost. And I will say obviously, that difference puts the railroads at a competitive disadvantage to the over-the-road truckers.

Q. Okay. And I think you heard Ms. Friedman talk about some of the other tax costs the railroads had. Do you have some comments with respect to that?

A. Yeah. I mean, they're paying taxes on their infrastructure, on the -- both the -- both the right-of-way as well as the cost to maintain that.

Again, that's in contrast to the trucking industry. The trucking industry certainly pays taxes on their vehicles, but they do not pay taxes on the highways and roadways. So there's a -- there are additional costs to the railroad industry that the trucking industry does not have to pay because it's funded by direct-user fees.

Q. And from an economist's standpoint, can you compare the burdens of these two taxes?

A. As I said before, they're really quite different. If you look at the excise tax on diesel, it is a net plus.

Again, I'll mention what I said before. The American Trucking Association, which represents the large trucking companies, has on several occasions asked for higher diesel taxes. They clearly must see that the tangible benefits to their industry exceed the costs they pay. So the excise tax [43] paid by the trucking industry is a net plus for them. In contrast, the sales tax paid by -- on diesel fuel paid by the railroads is a net cost. They are just not comparable in their impacts both from a financial perspective as well as from an economic perspective.

MR. McBRIDE: Thank you.

Your Honor, we have no further questions. We'd move Plaintiff's No. 2.

THE COURT: Any objections to Plaintiff's 2?

MS. McNEILL: No, your Honor.

THE COURT: It's received.

(Plaintiff's Exhibit 2 admitted into evidence.)

THE COURT: Mr. Maddox, your witness.

MR. MADDOX: Thank you, your Honor.

CROSS-EXAMINATION BY MR. MADDOX:

Q. If I may, my name is Keith Maddox. I'm one of the attorneys for the state of Alabama in this case, Dr. Mudge. How are you?

A. I'm doing great.

Q. Dr. Mudge, just I had a few questions about your testimony if you don't mind I'd like to get into.

Let's go to your report first on page 4. Something the attorney for CSX mentioned in his opening is the disposition of the sales taxes that are paid by the railroads in Alabama. On page 4 of your report, paragraph 15, you wrote [44] that in Alabama, these funds are used to construct or maintain railroad tracks and right-of-way but rather are not used to fund -- talking about sales taxes are not used to fund railroad tracks and right-of-way, but they're used for general -- you said "fund general purposes."

That's not really correct, is it, Dr. Mudge? That money does not go to the General Fund, I don't think.

A. I believe the state has decided to dedicate that to the education -- there's an Education Fund.

Q. Very good. So that this is not really correct in this report, then. It is dedicated for the Education Trust Fund in Alabama; isn't that correct?

A. That is -- yeah. Yes, that is correct.

Q. Oh, okay. You heard Ms. Friedman's testimony. You were sitting there. And to compare apples to apples -- and I think you touched on this a

little bit during your direct testimony. Truckers, your testimony, and it's been stipulated truckers pay 19 cents a gallon, basically, motor fuels tax in the state of Alabama. That's not all they pay, though, correct, Dr. Mudge?

A. That is correct.

Q. There's a lot more costs involved in trucking than just 19 cents a gallon?

A. Well, there's also -- there's two sets of things. One is the -- in terms of the infrastructure cost; that is, the [45] cost to build and maintain the highway system. Truckers do pay more. I mentioned the registration fees they pay which also goes into the state fund.

The -- obviously, there's also the trucks, the cost to operate and maintain their trucks.

Q. Okay.

A. Just as the railroads have a cost to operate and maintain the locomotives and their equipment as well.

Q. Stop me if I'm wrong, then. You said -- to put your testimony in a nutshell, it's basically what the railroad pays goes for something else. Doesn't really help them a whole lot. What the truckers pay goes to maintain the roads and the bridges they travel on. Is that basically --

A. That's correct.

Q. Okay. Let's talk about the motor fuels tax paid by truckers. It's been stipulated it goes to the Alabama Road and Bridge Fund. Do railroads exist in a vacuum? And by that I mean could railroads exist without a viable highway system? I mean, if we

took the highways away all of a sudden, highways and bridges, could a railroad exist as it does today if we did that?

A. Well, there's a point in time in history when they did exist. But --

Q. Talking about today. Today.

A. The freight movements use the entire network.

[46] Q. So railroads, they gain a benefit from having a well-maintained road and bridge system, correct?

A. They do. But they also, when they use the highway system, whether it's with their own trucks -- which the many railroads have a trucking fleet -- or if they're contracting that out to a trucking company, the trucking company is paying the diesel tax and is paying for the cost of the interstate -- of the highway system. So they don't get the highway system as a gift. They are paying for it either directly or indirectly through the use of the system.

Q. Okay. So a yes or no answer. Railroads benefit in today's market from a well-maintained road and bridge system?

A. They also pay for it, too.

Q. Yes, sir. Yes or no question.

A. They benefit -- they benefit from it, and they also pay for it.

Q. Sir, I'm asking for a yes or no answer. I asked you a simple question. Do railroads in today's market --

MR. McBRIDE: You Honor --

Q. -- benefit from a well-maintained -- just a yes or no.

MR. McBRIDE: -- this question -- benefit? It doesn't lend itself to a yes or no answer.

THE COURT: That's fine. I'm hearing all the evidence. Dr. Mudge, let's just answer the question with the [47] opportunity to expand on redirect.

Q. (BY MR. MADDOX:) Let me rephrase my question or restate my question. In today's market, do railroads benefit from a well-maintained road and bridge system?

A. Yes.

Q. Thank you, sir.

Okay, let's talk about the sales taxes that CSX pays. It's 4 percent statewide, correct?

A. I believe, yes.

Q. And there's locals, 4 percent here, 2 percent there?

A. Yeah.

Q. You agreed earlier that that money is allocated for the Alabama Education Trust Fund, correct?

A. Yes.

Q. Pays for high school, grade school, junior college, college. Goes everywhere, right? Funds the education system in Alabama.

A. I don't know exactly how it's used.

Q. Okay. How many people do you know at this moment -- you might not be able to answer at this moment, but let's say the last time you gathered data, how many people did CSX employ in the state?

A. That I don't know.

Q. I think it was in your report. Was there something in your report, an attachment? I think I saw 1,400 employees [48] in the state?

A. I don't -- I'm sure it's a large number, but I don't know.

Q. Okay. Well, let's -- you know, hey, let's say five people; they employ five people in the state. We can all agree they've got at least five people, right?

A. Right.

Q. CSX does not want to hire dumb people, correct? I mean --

A. I would guess -- I cannot speak for them, but I would guess that's the case.

Q. They need well-educated people. CSX benefits from a well-educated workforce, a pool of workers?

A. Correct.

Q. They do. So CSX does get a benefit from this 4 percent, right? I mean, they're not just throwing it in the wind and watching it float away, correct?

A. Well, let me say education is a different public function than transportation. Education is what's called a public good. It provides benefits very, very broadly. It's very difficult to identify a direct benefit from any particular industry or any particular individual. It is a public good. If the education were focused on specific skills needed by CSX, then maybe it's a parallel. But it's not. It's a general public good. Localities funded from -- [49] state and local government's funded from property taxes, local taxes. How it's funded locally is a local political decision.

Q. Okay. So you're saying, if I hear your testimony correctly, so even though the railroads may not get a -- which is arguable, I would think, a direct benefit from a good public education system, they certainly get an indirect benefit, correct?

A. I would think all industries in the state would gain from having a well-educated population.

Q. Yeah, but yes or no; CSX enjoys a benefit, either directly or indirectly, from a well-educated employment pool within the state? Yes or no?

A. I mean, I guess the answer is yes. I don't know -- you'd have to see --

Q. That's good. You said yes.

A. Let me just say I think it's -- you'd have to know where -- how many of their employees come from Alabama, how many -- it's a large company. You know, I'm guessing a fair number come from Alabama. But I don't know.

Q. Okay. You're aware that the truckers are -- we're going to hear testimony about this later. Truckers are fairly well regulated in the state, correct, in Alabama?

A. Yes.

Q. Do you know what the IRP program is?

[50] A. I'm sorry?

Q. The IRP program?

A. Yes.

Q. My southern dialect. I and R get to sound alike. IRP.

A. No. Yes, I know it.

Q. And IFTA, the IFTA program?

A. Absolutely.

Q. Okay. Are railroads subject to those programs?

A. Only to the extent they have their own trucking companies.

Q. Okay. Right. You call that the intermodal -- I think they call that the intermodal fleet or some --

A. Yes.

Q. -- have some special name for the trucks?

MR. MADDOX: I have no more questions, your Honor. Thank you.

Thank you, Dr. Mudge.

THE COURT: Mr. McBride, redirect?

REDIRECT EXAMINATION BY MR.McBRIDE:

Q. Dr. Mudge, I just have a couple of questions. I want to be sure you got your answers fully with respect to the so-called benefit that the railroads get by having a highway system. You want to expound on your yes or no answer to that question?

A. Yeah. The way the freight system operates in this [51] country is the shippers are the ones who largely decide will I ship my goods by rail, ship my goods by truck, ship my goods by intermodal, some combination of rail and truck. So the shippers will pick the combination that most suits their economic needs.

And again, there's, in case of -- in the case of the highway system, there is no real free lunch. So if it's shipped intermodally -- part of the movement on a rail, part of the movement by trucks -- the movement on trucks obviously pays the local diesel fuel tax, federal diesel fuel tax, registration fees. And that's used to fund the highway portion of the move.

Q. And again, with respect to this indirect benefit from having an education population, I gather that the trucks would benefit just as much as the railroads would from that, right?

A. That is true. I think the industry in the state of Alabama would benefit regardless of how it's paid for, whether it comes from property taxes, sales taxes, whatever.

Q. Well, when we start trying to look at and compare these benefits and burdens of taxes, it gets pretty dicey, doesn't it?

A. It gets -- dicey is a good word. Some of my other friends who are economists might consider it fun. But it's not easy.

[52] Q. And we could probably talk about a lot of other intangible benefits that might flow either to the trucks or to the railroads, couldn't we, if we wanted to talk about it?

A. Yes, even in the hospital system. All sorts of indirect benefits.

MR. McBRIDE: We have no further questions, your Honor.

THE COURT: Okay.

MR. MADDOX: Just one more question, Judge.

THE COURT: Okay.

RECROSS EXAMINATION BY MR. MADDOX:

Q. Mr. McBride just mentioned it gets dicey when you talk about benefits versus cost and how to allocate the benefits. Isn't that one of the inherent problems in trying to put a box around what everybody pays and why this is unfair and this is

unfair? Wouldn't you agree that that's why basically a state should have wide discretion in how they set up their taxing scheme?

A. I think it really depends on which expenditure you're looking at. So for example, if you look at transportation -- and I'll pick highways. There, there's a set of methodologies, some of which I helped develop, that you can look at the cost allocation, how much should each class of vehicle pay. So in certain classes, certain public activities, you know, there's standard methodologies that [53] can be -- you can define who benefits and how much and how much should they pay. When you get into classes such as that are called public goods, whether it's, you know, national defense being one, education being another, then it does get tricky.

MR. MADDOX: Okay. No more questions, your Honor. Thank you.

* * *

[55] DERRICK S. (Steve) DuBOSE,

duly sworn, was examined and testified as follows:

[56] DIRECT EXAMINATION BY MS. McNEILL:

Q. Mr. DuBose, what position do you hold with the Department of Revenue?

A. I'm the manager of the motor fuels section.

* * *

Q. And who pays the motor fuels tax?

A. Licensed distributors in Alabama who want to sell fuel and buy fuel tax-free, they file a monthly return each month and pay the tax.

Q. So your section deals with the distributors and not the end user; is that correct?

A. Correct.

Q. Okay. But you can testify as to how the motor fuels taxes are applied; is that correct?

A. We -- how they are distributed, we can.

Q. Okay. Would it be fair to say that the division between motor fuels tax and sales tax on diesel fuel is [57] basically a distinction between off-road and on-road vehicles?

A. Yes.

Q. And why are railroads exempt from paying motor fuels tax?

A. They're not exempt from paying the diesel fuel tax on clear diesel. They are if they use dyed diesel and pay that tax.

Q. And the railroads pay, to your understanding, they pay for the dyed diesel; is that correct?

A. Correct.

Q. And that's sales tax?

A. Sales tax.

Q. All right. And is there a specific exemption for dyed motor fuel?

A. Anyone that purchases dyed diesel fuel is exempt the state fuel tax and is subject to sales tax.

Q. Okay. What taxes do motor carries generally pay?

A. Usually pay the diesel fuel taxes used in their vehicles on the road.

Q. And how much is that?

A. 19 cents a gallon.

Q. And how is that broken down? How do you get to 19 cents?

A. There are two tax levies. The first levy is 13 cents a [58] gallon. The second tax levy is 6 cents a gallon, for a total of 19.

Q. And the state rate is always 19 cents no matter what the cost of diesel fuel; is that correct?

A. That's correct.

Q. And do motor carriers have occasion to pay sales tax on dyed fuel?

A. Yes.

Q. And when would that be?

A. If they use it in refrigerated units like on the trailers, they have a separate tank. They use dyed fuel, and they will pay the sales tax on dyed fuel.

Q. What about if a motor carrier is off road, operating exclusively in a coal pit, on a private construction site closed to the public, within the confines of a plant?

A. They usually use dyed fuel since it's off-road vehicles, so they're entitled to use dyed fuel.

Q. And that would be subject to sales tax?

A. That's right.

Q. Would the tax be paid directly to the sales and use tax division?

A. Yes.

Q. All right. Your section only deals with motor fuels tax?

A. That's correct.

[59] Q. Okay. What about if -- for their refrigeration units where they can use dyed fuel, how is that handled?

A. They just -- when they go to like a retail station and purchase dyed fuel, the sales tax is applied at that time.

Q. All right. How many motor fuel distributors do you collect tax from?

A. Currently we have 430.

Q. And do they file a monthly return with your section?

A. Yes.

Q. And does your section only collect motor fuel from the distributor?

A. Yes.

Q. All right. When, if a motor carrier has to pay for their gas at the pump, how does that work?

A. The distributor sells to the retail stations, and they collect the tax from the retail station. The retail station will then sell to the carriers, who recoup the tax from the carriers.

Q. All right. So when a motor carrier or, for example, like a private citizen that has a diesel truck buys fuel at the pump, buys clear diesel from the pump, they're always going to pay?

A. Yes.

Q. So there's no way to not pay it at the pump; is that correct?

[60] *A.* That's correct.

Q. Is there any type of mechanism similar to a direct-pay permit to purchase clear motor fuel?

A. The only way you purchase clear motor fuel is through being a licensed distributor.

Q. All right. Can cities and counties have local fuel tax?

A. Yes.

Q. And do any in Alabama?

A. Yes.

Q. And do you know how much?

A. It varies anywhere from 1 to 6 cents a gallon.

* * *

[61] Q. All right. How is the motor fuel tax distributed once we collect it?

A. At the end of each month, our office will distribute that money to the appropriate funds set up and that will go to the comptroller's office and they in turn will distribute the monies to the localities -- cities and counties -- and the state will seek -- will go and get their share.

Q. Where does the majority of the funds collected from the motor fuels tax go to?

A. Department of Transportation, Public Roads and Bridge Fund.

Q. What do we do with it once we collect it? Do we have anything more to do with it?

A. No.

Q. We just put it in a fund and send it?

A. We just put it in a fund. And once each month the DOT, [62] Department of Transportation, will go to that fund and get their share and the comptroller will process the monies to the cities and counties for theirs.

* * *

Q. Okay. Is there a penalty if a trucker or, for that matter, a private citizen that has a diesel dually, uses -- is caught with dyed fuel and they're on the highways of Alabama?

A. Yes.

Q. What is that?

A. A thousand dollars.

Q. Is that per occurrence?

A. The first two occurrences are a thousand each, and then after that, it's multiplied by each occurrence.

MS. McNEILL: All right.

No further questions at this time, Mr. DuBose.

THE COURT: Thank you.

Mr. Goodwin?

MR. GOODWIN: Your Honor, thank you.

CROSS-EXAMINATION BY MR. GOODWIN:

Q. Good morning, Mr. DuBose.

[63] *A.* Good morning.

Q. My name is Steve Goodwin. I'm an attorney for CSX.

You mentioned that you deal basically with the fuel distributors and not the end users; is that correct?

A. That's correct.

Q. In other words, the fuel distributors are collecting this excise tax for you?

A. Correct.

Q. And turning it over to you?

A. Yes, sir.

Q. All right. And you don't deal with sales taxes, correct?

A. That's correct.

Q. You're dealing with clear fuel, correct?

A. All fuels.

Q. All fuels? Okay. So you would also have something to do with the dyed fuels?

A. Yes.

Q. And before we go any farther, let's talk a little bit about that. Where does the dyed versus clear fuel come from? I mean, what's the source of some fuel is dyed and some is not? Do you know?

A. The source?

Q. Yeah. I mean, how did that come about?

A. Back years ago, I believe the federal government [64] passed -- changed their law to allow for dyed fuel to be used for off-road purposes and Alabama followed suit with their law.

Q. Okay. And the clear fuel is so that we know it's been taxed through the motor carrier fuels. And the dyed fuel, we know has not paid the motor fuel tax, right?

A. That's correct.

Q. Okay. And so that way, if you're a truck driver and you're driving from -- on I-65 and the Department of Transportation stops you and finds dyed fuel in your tank, you're in big trouble, right?

A. Yes, sir.

Q. Okay. You might end up here in court if you're a truck driver?

A. Yes.

Q. Now, you mentioned there are some local taxes on fuels. You said they range from 1 cent to 6 cents?

A. Yes, sir.

Q. Most are toward the 1 cent side, aren't they?

A. Majority are 1 or 2 cents a gallon.

Q. Okay. Now, the dyed fuel that you say tax is paid upon, things like trucks used within a plant, they're using dyed fuel, right?

A. Yes, sir.

Q. But they're not competing against the railroads, are [65] they?

A. I have no idea.

Q. Well, you're not going to move a ton of coal from Wyoming to Birmingham on dyed fuel in a truck, are you?

A. I would doubt it.

Q. Okay. And if a truck company pays for diesel fuel that goes into its refrigeration equipment on its truck, that fuel is not used to locomote the truck from point A to point B, is it?

A. No, sir.

Q. And the fuel that the trucks use to move a ton of widgets from point A to point B is the clear fuel, correct?

A. Correct.

* * *

[68] JAY STARLING,

duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MADDOX:

* * *

[69] *A.* I am. I am the assistant director of the motor vehicle division responsible for the registration and licensing of motor vehicles in the state.

Q. Okay. How long have you been at that job, Jay?

A. Coming up on 19 years.

Q. 19 years. And you are in a supervisory position in that job, correct?

A. That is correct.

Q. About how many people do you have working for you?

A. Approximately 40.

Q. Let's take kind of one thing at the time here. Would you explain to the Court what we refer to as the IRP section, the IRP unit of the department?

A. IRP is an acronym. It stands for International Registration Plan. Every U.S. state, 10 Canadian provinces, and the District of Columbia are members of this plan or agreement.

Actually, the Intermodal Surface Transportation Efficiency Act of 1991 caused the U.S. states to join this agreement, those states that were not already participants in this agreement. What it is is a cooperative agreement that allows for the registration of interstate commercial motor vehicles to cause them to operate freely across [70] inter-jurisdictional borders.

Under this plan or agreement, the carrier establishes a place of business in one of the jurisdictions or multiple jurisdictions. Then they license their vehicles.

When I say license, they get a tag and a registration receipt from their base jurisdiction. They claim or report which jurisdictions they intend to operate, and they pay registration fees to each of

those jurisdictions based on that jurisdiction's license fee.

Each jurisdiction has a different license fee. Alabama is responsible for collecting that particular license fee for that jurisdiction and distributing the proceeds to all affected jurisdictions.

The carrier is then issued a license plate and what we call a cab card, which is the registration receipt listing all of the jurisdictions in which they're authorized to operate at the registered weight.

Q. So if a trucker -- and I'm assuming you're dealing with mainly big trucks, motor carriers?

A. These are vehicles that have -- that are over 26,000 pounds gross vehicle weight or have more than three axles on the power unit of the vehicle.

Q. Okay. So if a motor carrier registers -- and they can register in the state of Alabama, that's your testimony, if they're in the state?

[71] *A.* Yes. If they have an established place of business within the state of Alabama, they can elect to have Alabama as their base jurisdiction and license their vehicles accordingly in Alabama.

Q. Okay. But you also said you're responsible for collecting any jurisdiction that he says he's going to be -- or she is going to be operating in, correct?

A. That is correct.

Q. Okay. What are the jurisdictions within the IRP? What kind of area are we talking about? The entire U.S.?

A. The geographical U.S., the contiguous U.S. states, the District of Columbia, and 10 Canadian provinces.

Q. Okay. How much -- can you say for certain how much an IRP registration will cost an applicant who comes into office to register with IRP?

A. On average, registrations -- these are per vehicle -- average $1,200 to $1,500 per registration per year. And let me qualify that by saying your registration fees are dependent upon the percentage of miles that you operate in each jurisdiction.

As I mentioned, each jurisdiction has a different license fee which we are required to charge. For example, if a registrant operates majority of their miles in a high fee jurisdiction like Mississippi, their fees could be much higher. On the contrary, if they operate a majority of [72] their miles in a low fee state like Georgia, their fees could be lower.

Q. But they tell you up front where they're going to be operating, and that allows you to know what to charge?

A. If they have no prior experience during the -- we call it the mileage reporting period, which is the 12-month period prior to the license year, they can estimate. And we have a chart that they can use, and the chart is created based on the average mileage accumulated by all carriers based in Alabama. Otherwise, they'd have to report the actual distance that they traveled in that jurisdiction.

Q. Okay. That was the IRP program, correct? We were just talking about the IRP?

A. Correct.

Q. Can you also tell the Court about what we referred to as the IFTA program, what that is?

A. IFTA is another acronym, and it stands for International Fuel Tax Agreement. It is a very

similar program in that the jurisdictions, the contiguous U.S. states and 10 Canadian provinces joined. Many were forced to join or encouraged to join, I should say, by the ISTEA Act of 1991. And since -- we've been a member since 19 -- we, being Alabama, have been a member since '95.

As I said, it's a very similar program to IRP, where the carrier selects a base jurisdiction based on having [73] established place of business in that jurisdiction. They obtain a license -- and this is where it's a little different. The IFTA license is a blanket license. It allows the carrier to operate in any of the IFTA jurisdictions.

Another thing that's different is that as a condition of obtaining the license, the carrier is required to report the mileage that they accumulate in each jurisdiction as well as the fuel purchased or withdrawn in each jurisdiction on a quarterly basis. And Alabama is responsible for -- like IRP, Alabama is responsible for collecting the fuel taxes for all the members of IFTA for that particular tax return at the jurisdiction's tax rates. And then we're responsible for distributing those proceeds to all the affected member jurisdictions.

Q. You said when an applicant comes in with IRP it's twelve to fifteen hundred a year. What about IFTA? When an applicant comes in to register with your office with the IFTA program, how much money are we talking there?

A. There is no application fee in Alabama, and there is no license fee. However, each vehicle is required to display fuel decals or fuel markers on

each side of the cab of the vehicle. A set of decals in Alabama will cost $17 per set.

Q. Okay. Do you deal with railroads in any way with your duties with IRP or IFTA?

[74] *A.* No, sir.

Q. Do not deal with railroads?

MR. MADDOX: That's all, your Honor. Thank you.

THE COURT: Any cross? Mr. McBride?

MR. McBRIDE: I'll try this one, your Honor.

CROSS-EXAMINATION BY MR. McBRIDE:

Q. Mr. Starling, good morning. I'm Jim McBride. I'm one of the lawyers --

A. Good morning.

Q. -- for CSX in this case. I just have a few questions. I just want to be sure we're clear.

Now, these trucks that are in the part of the IRP and the IFTA, the big trucks, they're really the competitors of the railroads, right? They're the big haulers of commodities and freight here in the country; is that right?

A. They do haul freight, yes, sir.

* * *

[76] Q. Okay. Now, again, with respect to IFTA, I want to be sure I understood you correctly. If I understand IFTA, that's so that the motor fuel taxes with respect to trucks get distributed over the places where those trucks actually operate?

[77] *A.* That's correct.

Q. And so these quarterly returns that you talked about, when they come in, they ultimately go to some clearinghouse, right?

A. If the jurisdiction is a member of the IFTA clearinghouse -- and 95 percent are -- the jurisdiction sends a transmittal report, which is basically a summary of all of the fuel taxes reported by the carriers based in that jurisdiction. That transmittal is sent to the clearinghouse by every jurisdiction, and then each jurisdiction either receives or pays the net amount.

Q. Right. And Alabama is one of those people who would send this report to the clearinghouse, right?

A. Yes, sir.

Q. And that clearinghouse would then determine, based on how many miles the various trucks operated, whether they paid too much tax in Alabama or they hadn't paid enough tax in Alabama, right?

A. Well, the clearinghouse, again, is a netting --

Q. Right.

A. -- of all the quarterly tax returns filed by every carrier operating under the IFTA program.

Q. And when they net that out, sometimes Alabama gets a checks from them, and sometimes Alabama has to write them a check, right?

[78] *A.* That is correct, yes, sir.

Q. And again, just to be clear, the funds that come in through IFTA, they get distributed and go the very same way that Mr. DuBose talked about. They go to DOT for the Bridge and Highway Fund, correct?

A. Yes, sir.

Q. Okay.

* * *

[80] JOE WALLS,

duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MS. McNEILL:

* * *

[81] Q. How is the sales and use tax division organized?

A. Well, we have an administrative section that works in the Gordon Persons Building in Montgomery that oversees the day-to-day operations. They answer telephone calls, process returns, that sort of thing. We also have an assessment unit that assesses delinquent and past-due taxes and a field section that does the audits, both in state and out of state.

Q. Okay. And who pays sales and use tax?

A. Well, any consumer, basically, of products that are considered tangible personal property would pay to the seller, the retail merchant, the tax when they make that purchase.

Q. So it's a generally applicable tax?

[82] *A.* It is, yes.

Q. And what is the state rate?

A. The state rate is 4 percent on most property. We do have a couple of lower rates for automobiles and for farm machinery and manufacturing machinery. But the basic rate is 4 percent.

Q. All right, so the Coke I bought this morning would be the same state sales tax rate as the diesel fuel CSX buys; is that correct?

A. That's correct, yes.

Q. Same for clothes, toothpaste; it's all 4 percent?

A. Right.

Q. Okay. Mr. Walls, can it be separated out the amount of sales and use taxes paid on diesel fuel? Or is it all one lump -- is it all lumped together?

A. Yeah, when we collect it, it's on a consolidated report from that retailer. They don't have to break out items by the type of item it is. It's just strictly a gross receipts type report, and that's what we get from the merchants or the retailer.

Q. So we can't tell, you know, how much was spent on nails and how much was spent on Coke or -- just an aggregate?

A. Right.

Q. Okay. What is direct-pay permit?

A. That's a permit that's issued directly to a purchaser [83] where they make purchases that at the time that they make the purchase, they're not sure what the rate of tax might be on it, or it's issued to them as convenience more than anything else; that instead of them having to pay the tax through their suppliers, they pay it directly to the Department of Revenue on that direct-pay permit.

Q. And CSX pays that way, correct?

A. They do.

* * *

Q. Okay. Did you have -- you know, a comparison, did you look at information to make a comparison between state sales tax paid by CSX and the motor fuels tax?

A. We have looked at some information that they provided on their purchases and issues and things like that. We did look at that, yes.

Q. Okay, okay. Well, I'm going to show you -- I don't know how to use the computer, so I'm kind of -- I blew this up. This is Exhibit 1, our chart. I'm going to show you what I have marked as Defendant's Exhibit 1.

A. Okay.

[84] (Defendant's Exhibit 1, oversized chart, marked for identification.)

Q. And can you tell me what that is? And if it's easier, I blew it up. We can use that. Can you explain to the judge what that is and what are these figures?

A. Yeah, these numbers here, the average issue price was obtained from information that CSX provided. We took all their purchases and their number of gallons and tried to get an average price per gallon for the fuel that they purchased. And then we calculated the 4 percent state tax on that average issue price per gallon. And in this column here, we've got the total amount of the average price of the gallon plus the tax over here in this column here.

Q. Okay. That's the 4 percent state tax?

A. It is. 4 percent, right.

Q. And that's because we don't administer any localities involved?

A. That's correct.

Q. These figures that we added 19 cents for, do we know that that's what the motor fuels, what they applied the 19 cents for, or did we just use CSX's figures?

A. We used CSX's figures over here for the gallons and applied the 19 cents per gallon to that to get the total over here on the right.

Q. So the motor carriers could have started with a higher [85] rate possibly. We don't know?

A. Yeah, they could have.

Q. Yeah. So just for convenience, we used CSX figures?

A. Right.

Q. Okay. All right. All right.

MS. McNEILL: Your Honor, we move to admit Defendant's Exhibit 1.

THE COURT: Any objection?

MR. McBRIDE: No objection.

THE COURT: Defendant's 1 is received.

(Defendant's Exhibit 1 admitted into evidence.)

Q. (BY MS. McNEILL:) Okay. Let's see. Mr. Walls, do motor carriers pay sales and use tax on anything?

A. Yeah, they pay tax on any kind of equipment that they purchase, of course. Any kind of repair parts that they may purchase, they pay sales tax on, yes.

Q. And that's in addition into if they have an occasion to buy dyed diesel fuel; is that correct?

A. That's right, yes.

Q. I believe you were here when Mr. DuBose testified that motor carriers pay sales and use tax on their fuel for their refri units, our shorthand for refrigeration units; is that correct?

A. Right. They're subject to sales tax, right.

Q. And he also testified that they would pay sales tax if [86] they're operating within the confines of a private plant, logging trail --

A. Right.

Q. -- private property?

A. Something other than highway use, yes.

Q. Okay. And now, water carriers pay sales tax on intrastate only; is that correct?

A. That's right.

Q. Now, for the interstate carriers, are we allowed to tax the portion of the trip that actually occurs intrastate?

A. No, we're not. The courts have ruled that we cannot tax that. If it's purchased by a carrier that's going to be, you know, going in interstate or intercoastal waterways and also some in Alabama, we cannot tax that portion in Alabama.

Q. Okay. So we have been prevented from that?

A. Right. Uh-huh.

Q. Okay. What happens if the department audits a supplier of diesel fuel and finds that no sales tax or use tax has been paid on various transactions?

A. Well, normally it would be set up against the retail merchant that's selling that fuel. But if the purchaser has given them a certificate saying that they're buying this fuel for use in interstate or intercoastal commerce and the merchant has accepted that in good faith, then we would have [87] to go against the purchaser that falsified that document to get the tax back.

Q. But it's the ultimate responsibility of the seller to --

A. It is the responsibility of the seller to make sure that they collect the right amount of tax. And if they accept a certificate saying that it's going to be used in interstate commerce, then they accept that in good faith.

Q. Okay. Where do the revenues from sales tax go?

A. Goes to the Education Trust Fund.

Q. And is that the largest operating fund in the state?

A. It is, yes.

Q. And what does it basically fund?

A. It funds education in Alabama, K through 12, and even colleges and universities as well.

Q. All right. And that's all sales tax, correct?

A. It is, right.

* * *

[89] Q. Okay. And why -- I mean, we've had continuous testimony on this. But sales taxes, it basically boils down to on-road and off-road. The reason the railroads pay sales tax instead of motor fuels tax is because they use the dyed diesel off road; is that correct?

A. That's correct, yes.

* * *

CROSS-EXAMINATION BY MR. McBRIDE:

Q. Mr. Walls, I'm Jim McBride. I think you and I just spoke before.

A. Yes, sir.

Q. I have very few questions. I think you answered most of my questions I had in your direct,

but I want to be sure I understand. I'm not asking you for a legal opinion. I'm asking you what you think as the director of the sales and use tax unit.

The localities under Alabama law couldn't impose a sales tax on anything that the state didn't impose that sales tax on; that's correct, isn't it?

[90] *A.* That's right. If they abide by the local tax simplification act, they're supposed to parallel what we do, that's correct.

Q. And the only thing that could be different under Alabama law is just a different rate; is that correct?

A. That's correct.

Statement by Richard R. Mudge, Ph.D.

1. The purpose of my testimony is to explain that the per-gallon excise taxes on motor fuels in the US and in Alabama are dedicated user fees that provide tangible benefits to highway users, including the motor carrier industry. These user fees have historically been, and continue to be, the principal source of funds to construct, improve, and maintain highways. As such, these highway user fees directly benefit the trucking industry. In contrast, the sales tax on diesel fuel paid by the railroads in Alabama does not provide direct benefits for the railroads

2. State and federal highway finance in the United States has long depended on a system of dedicated user fees. This approach has been in place for more than seventy years. It makes sense for several reasons: it is logical; it reflects basic economic principles; and it has been mandated by law.

3. There is a strong common sense argument in favor of dedicated fees: individuals and firms should pay for what they use and firms and individuals who do not use the highway network should not be asked to subsidize it.[1]

[1] Exceptions occur for local roads that provide access to property. These are often funded by property taxes or by impact fees imposed on new development. Toll roads and bridges represent a special case since the fees are dedicated to a specific facility.

4. User fees are supported by basic economic principles as well. Fees that reflect the benefits received by a firm or individual are also called a benefit tax. Very simply, a benefit tax is

> *A tax linked to a service provided by government, e.g. a bridge toll, or a leisure centre admission charge. The principle followed is "he who benefits should pay."*[2]

5. The dedication of highway user fees to support highway spending has long been part of our national transportation policy. Indeed, in 1934 the US Congress passed the Hayden-Cartwright Act. This required states to dedicate receipts from motor vehicle taxes to highways, with the justification that:

> *...it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways.*[3]

6. In sum, benefit taxes are an equitable and efficient way for public agencies to collect the funds they need to build, maintain, and operate networks or facilities that have many users.

7. The exact nature of these benefit taxes varies by state. Every state and the federal government impose a tax on gasoline and a tax on highway diesel fuel. The diesel fuel tax represents the largest highway benefit tax paid by the motor carrier

[2] Routledge Dictionary of Economics, Second Edition.

[3] 48 Stat. 993; Pub Number 393; 73rd Congress

industry, totaling 25 percent of the highway excise taxes paid into the Highway Account of the federal Highway Trust Fund in 2010.

8. In addition to the 24.4 cent per gallon federal tax on diesel fuel, the federal government includes other truck taxes in an attempt to reduce the underpayment by large trucks. The most important of these other taxes is as 12 percent tax on new truck sales and a heavy vehicle use tax.

9. Alabama charges a 19 cent per gallon tax on highway diesel fuel. In 2010, this tax accounted for 24 percent of highway user revenues paid into the Alabama Public Roads and Bridges Fund.[4] There is a 16 cent per gallon tax on gasoline. Trucks also pay vehicle registration fees. These funds are also deposited into the state's Public Roads and Bridges Fund.

10. In 1956, the US government established the Highway Trust Fund as a mechanism to ensure that federal highway taxes would be excluded from the general fund. Today the Highway Trust Fund includes an account for highways and one for mass transit, but the basic principle remains unchanged: highway user fees are protected from expenditure on general purposes. As summarized by the Congressional Budget Office:

[4] Alabama Department of Transportation Ninety-Ninth Annual Report; page 20.

This approach kept the cost of roadbuilding from burdening other taxpayers, ensured that the taxes paid by road users would be sent back to them in the form of better roads, and permitted an unprecedentedly large highway program – the Interstate system – to begin and proceed uninterrupted.[5]

11. Today, state Departments of Transportation use a variety of mechanisms to ensure that the bulk of higher user fees are dedicated to transportation. In Alabama this mechanism takes the form of the Public Roads and Bridges Fund. While some states (and the federal government) use a portion of these funds for other transportation purposes, this is not the case in Alabama since all highway user revenues are spent on highway investments and maintenance.

12. Support for this form of dedicated taxes is broad and long term. In fact, in recent years, the American Trucking Association has called for higher federal diesel fuel taxes as long as these funds were dedicated to highway improvements. That is, higher benefit taxes are seen as a positive feature to the trucking industry since they also receive higher benefits.

"Trucking companies are willing to support an increase in the fuel tax if the revenues are dedicated to projects and programs that will

[5] Congressional Budget Office, "Financial Options for the Highway Trust Fund;" (December, 1982); page 19.

benefit goods movement on the nation's highways."[6]

"While we know that Congress is not receptive to a fuel tax increase, we would like the record to reflect that the trucking industry is willing to accept a fuel tax increase to help fund infrastructure."[7]

13. This system provides a competitive advantage to the trucking industry relative to their largest competitor. The trucking industry receives access to a national highway network funded by dedicated user fees, while the railroads must pay the full costs to build, maintain, and operate their track, signals, and right of way For example, in 2009 (for the latest year in which data are available), the railroad industry spent more than $14.8 billion to maintain and operate its track and signal structure[8]. In addition to these costs, many states, Including Alabama, impose sales and use taxes on the material needed to operate and maintain railroad track and signal structure. In the four-year period, 2007-2010,

[6] The American Trucking Associations Statement for the Record Hearing on Legislative Issues for Transportation Reauthorization Before the Committee on Environment and Public Works United States Senate, (July 21, 2011).

[7] Statement of Barbara Windsor, President and CEO of Hahn Transportation Inc. and Chairman of American Trucking Associations Before the House Subcommittee on Highways and Transit, (March 29, 2011).

[8] 2010 Railroad Facts, published by the Association of American Railroads p. 15 and p. 44.

the CSX Corporation paid more than $10 million in sales and use taxes in Alabama on track and signal material used to maintain and operate its tracks. See Exhibit A attached hereto. CSX also paid more than $400,000 annually in ad valorem taxes on its track structure in Alabama over the last 4 years. See Exhibit B attached hereto. It is difficult to calculate the amount of ad valorem taxes paid on track and signal structure for the nation as a whole because of the way railroads are valued for ad valorem tax purposes, and because states vary in how they treat different elements of the track structure. In any case, CSX pays millions of dollars in ad valorem taxes annually on its track and signal structure in addition to its own expenditures to build and maintain its track and signal system.

14. Federal and state cost allocation studies consistently show that heavy trucks (those that compete most directly with the railroads) actually pay less than the costs that they impose on the roadway system. Alabama has yet to conduct a highway cost allocation study, but other states in the Southeast have. For example, the highway cost allocation study conducted for the state of Kentucky shows that heavy trucks pay about 90 percent of their share of roadway taxes.[9] Kentucky's tax on diesel fuel is currently 23.4 cents per gallon[10] and the state also imposes a weight-distance tax on trucks.

[9] Kentucky Transportation Center, University of Kentucky; *2000 Highway Cost Allocation Update*; (March 2000); page v.

[10] Kentucky Tax Alert; July 2011, Vol. 30, No. 3, page 2.

Kentucky does not impose a sales tax on diesel fuel used for railroad purposes.

15. The Alabama system of highway finance reflects common sense as well as economic principles of efficiency and equity. This stands in sharp contrast to the state and local sales and use tax on diesel fuel used by railroads. In Alabama these funds are not used to construct or maintain railroad track and right of way, but rather are used to fund general purposes. Trucks are exempt from sales and use taxes on their purchases of diesel fuel.

16. While both trucks and railroads pay taxes in Alabama triggered by the purchase of diesel fuel, these taxes are not comparable. The motor carrier industry receives tangible benefits in the form of a network of well maintained roads and bridges for the taxes it pays, while the railroad industry must build, maintain and pay taxes on its rail network from its own resources, and receives no direct benefit from the sales taxes it pays.

17. I have attached a recent curriculum vitae listing my qualifications. I have further attached a list of all publications authored or co-authored by me in the past ten years. I have not testified as an expert at trial or by deposition in the past four years. My compensation for the study and testimony in this case is $400 per hour.

[signature]_____

Richard R. Mudge, Ph.D.

Exhibit A: Track and Signal Taxes Paid by CSX Railroad 2007 - 2010

		Track	Signal	Total
Alabama	2007	$1,882,786.82	$539,004.39	**$2,421,791.21**
	2008	$2,646,883.88	$246,797.01	**$2,893,680.89**
	2009	$2,070,554.48	$172,112.61	**$2,242,667.09**
	2010	$2,549,083.03	$156,903.88	**$2,705,986.91**
	Total	**$9,149,308.21**	**$1,114,817.89**	**$10,264,126.10**

		Track	Signal	Total
All States	2007	$11,792,775.48	$2,477,200.90	**$14,269,976.38**
	2008	$12,514,763.57	$1,930,215.39	**$14,444,978.96**
	2009	$14,181,336.34	$1,693,566.59	**$15,874,902.93**
	2010	$12,184,929.94	$1,814,472.95	**$13,999,402.89**
	Total	**$50,673,805.33**	**$7,915,455.83**	**$58,589,261.16**

Exhibit B: Ad Valorem Taxes Paid by CSX Railroad in Alabama

	2010	2009	2008	2007	2006
Assessed Value of Tracks	$11,368,787	$11,253,613	$11,253,973	$11,233,416	$11,223,834
Total Effective Tax Rate	0.03962	0.03783	0.03883	0.03840	0.03725
Taxes on Track	$450,470	$425,727	$436,970	$431,323	$418,087

CSX Transportation

Comparison of State Sales Taxes Paid on Dyed Diesel Fuel to
State Motor Fuels Tax on Undyed Diesel Fuel

(A) Period	(B) Average Issue Price Per Gallon	(C) State Sales Tax Per Gallon (4% x Column B)	(D) Total Avg Issue Price + State Sales Tax Per Gallon (Column B + Column C)	(E) State Motor Fuel Tax Per Gallon ($0.19 per Gallon)	(F) Total Avg Issue Price+State Motor Fuel Tax Per Gallon (Column B+ Column E)
1/26/2007	$1.6345	$0.0654	$1.6999	$0.19	$1.8245
2/23/2007	$1.6415	$0.0657	$1.7072	$0.19	$1.8315
3/30/2007	$1.7802	$0.0712	$1.8514	$0.19	$1.9702
4/27/2007	$1.9278	$0.0771	$2.0049	$0.19	$2.1178
5/25/2007	$1.9462	$0.0778	$2.0240	$0.19	$2.1362
6/29/2007	$2.0527	$0.0821	$2.1348	$0.19	$2.2427

7/27/2007	$2.1446	$0.0858	$2.2304	$0.19	$2.3346
8/24/2007	$2.1355	$0.0854	$2.2209	$0.19	$2.3255
9/28/2007	$2.2077	$0.0883	$2.2960	$0.19	$2.3977
10/26/2007	$2.3404	$0.0936	$2.4340	$0.19	$2.5304
11/23/2007	$2.5584	$0.1023	$2.6607	$0.19	$2.7484
12/28/2007	$2.6305	$0.1052	$2.7357	$0.19	$2.8205
1/25/2008	$2.6063	$0.1043	$2.7106	$0.19	$2.7963
2/22/2008	$2.5662	$0.1026	$2.6688	$0.19	$2.7562
3/28/2008	$3.0249	$0.1210	$3.1459	$0.19	$3.2149
4/25/2008	$3.2556	$0.1302	$3.3858	$0.19	$3.4456
5/23/2008	$3.4619	$0.1385	$3.6004	$0.19	$3.6519
6/27/2008	$3.8679	$0.1547	$4.0226	$0.19	$4.0579
7/25/2008	$3.9399	$0.1576	$4.0975	$0.19	$4.1299
8/22/2008	$3.5221	$0.1409	$3.6630	$0.19	$3.7121
9/26/2008	$3.2287	$0.1291	$3.3578	$0.19	$3.4187

10/24/2008	$2.8585	$0.1143	$2.9728	$0.19	$3.0485
11/21/2008	$2.0114	$0.0805	$2.0919	$0.19	$2.2014
12/26/2008	$1.6374	$0.0655	$1.7029	$0.19	$1.8274
1/23/2009	$1.4074	$0.0563	$1.4637	$0.19	$1.5974
2/20/2009	$1.4032	$0.0561	$1.4593	$0.19	$1.5932
3/27/2009	$1.2502	$0.0500	$1.3002	$0.19	$1.4402
4/24/2009	$1.4023	$0.0561	$1.4584	$0.19	$1.5923
5/22/2009	$1.4206	$0.0568	$1.4774	$0.19	$1.6106
6/26/2009	$1.6801	$0.0672	$1.7473	$0.19	$1.8701
7/24/2009	$1.7534	$0.0701	$1.8235	$0.19	$1.9434
8/21/2009	$1.8225	$0.0729	$1.8954	$0.19	$2.0125
9/25/2009	$1.8758	$0.0750	$1.9508	$0.19	$2.0658
10/23/2009	$1.8541	$0.0742	$1.9283	$0.19	$2.0441
11/20/2009	$2.0368	$0.0815	$2.1183	$0.19	$2.2268
12/25/2009	$1.9962	$0.0798	$2.0760	$0.19	$2.1862

CSX Transportation Information from Margaret McNeill, October 17, 2011
Exhibit B, Location in Alabama.

			Purchased		Issued	
Period Ending	Resp Code	Location	Quantity	Amount	Quantity	Amount
1/26/2007	24800	FUEL, BIRMINGHAM, AL	1,486,114.00	2,276,538.67	-1,437,608.00	-2,347,951.93
	728200	FUEL, DTL (McDuffie Coal Terminal) MOBILE, AL	3,000.00	4,895.26	-3,000.00	-4,759.50
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	23,947.00	39,325.74	-23,947.00	-39,497.10
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	3,396.00	6,196.00	-3,396.00	-5,858.87
	25200	FUEL, MONTGOMERY, AL	244,103.00	380,133.60	-238,734.00	-391,547.29
			1,760,560.00	2,707,089.27	-1,706,685.00	-2,789,614.69
		Per Gallon		$1.5376		$1.6345

2/23/2007	24800	FUEL, BIRMINGHAM, AL	1,674,574.00	2,761,625.68	-1,629,598.00	-2,673,183.02
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	19,358.00	30,242.89	-19,358.00	-30,866.62
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	3,013.00	5,260.70	-3,013.00	-5,136.47
	25200	FUEL, MONTGOMERY, AL	301,474.00	501,600.61	-303,668.00	-501,016.58
			1,998,419.00	3,298,729.88	-1,955,637.00	-3,210,202.69
		Per Gallon		$1.6507		$1.6415
3/30/2007	24800	FUEL, BIRMINGHAM, AL	1,793,460.00	3,105,118.98	-2,212,562.00	-3,938,780.30
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	30,463.00	52,774.27	-30,463.00	-54,433.57
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	4,000.00	7,582.00	-4,000.00	-7,240.55
	25200	FUEL, MONTGOMERY, AL	251,404.00	435,708.01	-262,759.00	-467,484.82
			2,079,327.00	3,601,183.26	-2,509,784.00	-4,467,939.24
		Per Gallon		$1.7319		$1.7802

4/27/2007	24800	FUEL, BIRMINGHAM, AL	1,586,234.00	2,954,272.39	-1,324,577.00	-2,555,791.70
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	29,846.00	56,656.16	-29,846.00	-57,919.64
	579800	FUEL, DTL MONTGOMERY, AL	3,000.00	5,723.10	-3,000.00	-5,870.75
	25200	FUEL, MONTGOMERY, AL	226,859.00	424,686.74	-219,780.00	-420,986.53
			1,845,939.00	3,441,338.39	-1,577,203.00	-3,040,568.62
		Per Gallon		$1.8643		$1.9278
5/25/2007	24800	FUEL, BIRMINGHAM, AL	1,443,703.00	2,768,913.08	-1,368,196.00	-2,662,564.62
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	23,265.00	45,534.39	-23,265.00	-45,401.78
	25200	FUEL, MONTGOMERY, AL	209,036.00	401,184.31	-212,847.00	-414,373.84
			1,676,004.00	3,215,631.78	-1,604,308.00	-3,122,340.24
		Per Gallon		$1.9186		$1.9462

6/29/2007	24800	FUEL, BIRMINGHAM, AL	1,531,504.00	3,183,800.28	-1,590,954.00	-3,265,671.95
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	33,580.00	72,120.88	-33,580.00	-69,370.72
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	2,500.00	5,120.00	-2,500.00	-5,010.92
	25200	FUEL, MONTGOMERY, AL	208,590.00	433,149.78	-215,049.00	-441,218.41
			1,776,174.00	3,694,190.94	-1,842,083.00	-3,781,272.00
		Per Gallon		$2.0799		$2.0527
7/27/2007	24800	FUEL, BIRMINGHAM, AL	1,305,384.00	2,742,937.72	-1,368,213.00	-2,934,543.84
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	41,966.00	92,982.85	-41,966.00	-89,993.00
	25200	FUEL, MONTGOMERY, AL	164,202.00	346,864.45	-164,202.00	-351,916.54
			1,511,552.00	3,182,785.02	-1,574,381.00	-3,376,453.38
		Per Gallon		$2.1056		$2.1446

8/24/2007	24800	FUEL, BIRMINGHAM, AL	1,318,840.00	2,720,149.96	-1,212,245.00	-2,587,969.99
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	28,611.00	63,565.40	-21,221.00	-45,231.54
	25200	FUEL, MONTGOMERY, AL	183,673.00	381,625.97	-154,120.00	-329,948.55
			1,531,124.00	3,165,341.33	-1,387,586.00	-2,963,150.08
		Per Gallon		$2.0673		$2.1355
9/28/2007	24800	FUEL, BIRMINGHAM, AL	1,631,936.00	3,577,843.65	-1,682,747.00	-3,717,186.22
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	27,635.00	63,776.62	-28,097.00	-61,856.38
	679800	FUEL, DTL MONTGOMERY, AL	3,993.00	9,042.95	-3,993.00	-9,195.19
	25200	FUEL, MONTGOMERY, AL	228,138.00	494,699.60	-242,594.00	-553,114.38
			1,891,702.00	4,145,362.82	-1,957,431.00	-4,321,352.17
		Per Gallon		$2.1913		$2.2077

10/26/2007	24800	FUEL, BIRMINGHAM, AL	1,447,758.00	3,350,703.57	-1,395,971.00	-3,266,951.82
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	26,226.00	63,112.14	-33,154.00	-77,970.62
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	9,913.20	24,452.66	-9,913.20	-23,258.30
	25200	FUEL, MONTGOMERY, AL	159,069.00	366,350.89	-164,717.00	-385,245.70
			1,642,966.20	3,804,619.26	-1,603,755.20	-3,753,426.44
		Per Gallon		$2.3157		$2.3404
11/23/2007	24800	FUEL, BIRMINGHAM, AL	1,365,969.00	3,562,224.50	-1,439,967.00	-3,681,891.50
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	20,905.00	56,162.14	-20,905.00	-53,995.73
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	9,023.00	25,542.68	-9,023.00	-23,720.56
	676900	FUEL, DTL DOTHAN, AL	4,339.00	10,958.91	-4,339.00	-11,445.76
	25200	FUEL, MONTGOMERY, AL	156,766.00	407,548.30	-166,215.00	-425,925.10

			1,557,002.00	4,062,436.53	-1,640,449.00	-4,196,978.65
		Per Gallon		$2.6091		$2.5584
12/28/2007	24800	FUEL, BIRMINGHAM, AL	1,591,027.00	4,146,368.30	-1,762,639.00	-4,636,957.11
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	21,451.00	56,566.72	-14,458.00	-37,633.52
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	6,630.20	17,785.45	-6,630.20	-17,545.14
	676900	FUEL, DTL DOTHAN, AL	0.00	0.00	0.00	0.01
	25200	FUEL, MONTGOMERY, AL	152,471.00	398,153.97	-152,471.00	-401,115.13
			1,771,579.20	4,618,874.44	-1,936,198.20	-5,093,250.89
		Per Gallon		$2.6072		$2.6305
					2007 21,295,500	S-1
1/25/2008	24800	FUEL, BIRMINGHAM, AL	1,642,725.00	4,239,860.94	-1,429,481.00	-3,723,406.52
	25100	FUEL, DTL (RACK	36,037.00	95,073.75	-42,030.00	-112,063.95

		PICKUP) MOBILE, AL				
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	8,913.00	24,487.90	-3,910.00	-10,263.25
	676900	FUEL, DTL DOTHAN, AL	-112.00	1,045.37	112.00	184.83
	25200	FUEL, MONTGOMERY, AL	167,915.00	434,376.31	-159,457.00	-415,083.53
			1,855,478.00	4,794,844.27	-1,634,766.00	-4,260,632.42
		Per Gallon		$2.5842		$2.6063
2/22/2008	24800	FUEL, BIRMINGHAM, AL	1,445,456.00	3,751,285.93	-1,501,629.00	-3,852,725.21
	25100	FUEL, (RACK PICKUP) MOBILE, AL	25,284.00	67,818.41	-25,284.00	-65,554.17
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	28,765.70	78,631.53	-33,768.70	-86,454.05
	676900	FUEL, DTL DOTHAN, AL	6,178.00	17,235.79	-6,178.00	-15,878.27
	25200	FUEL, MONTGOMERY, AL	120,625.00	313,371.58	-124,570.00	-320,008.50
			1,626,308.70	4,228,343.24	-1,691,429.70	-4,340,620.20

		Per Gallon		$2.6000		$2.5662
3/28/2008	24800	FUEL, BIRMINGHAM, AL	1,822,688.00	5,603,344.46	-1,757,882.00	-5,326,164.19
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	46,652.00	145,295.53	-46,652.00	-139,238.21
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	22,658.10	73,422.68	-22,658.10	-70,532.90
	676900	FUEL, DTL DOTHAN, AL	-2,500.00	-6,898.25	2,500.00	7,535.72
	79800	FUEL, DTL MONTGOMERY, AL	1,290.00	3,342.00	-1,290.00	-3,554.78
	25200	FUEL, MONTGOMERY, AL	168,956.00	513,421.20	-173,469.00	-516,139.51
			2,059,744.10	6,331,927.62	-1,999,451.10	-6,048,093.87
		Per Gallon		$3.0741		$3.0249
4/25/2008	24800	FUEL, BIRMINGHAM, AL	1,470,083.00	4,833,430.66	-1,533,203.00	-4,993,258.94
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	19,908.00	67,089.72	-19,908.00	-65,257.50

	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	14,104.40	48,716.54	-14,104.40	-45,787.71
	25200	FUEL, MONTGOMERY, AL	101,958.00	328,971.23	-101,958.00	-329,791.91
			1,606,053.40	5,278,208.15	-1,669,173.40	-5,434,096.06
		Per Gallon		$3.2864		$3.2556
5/23/2008	24800	FUEL, BIRMINGHAM, AL	1,600,297.00	5,704,220.34	-1,209,398.00	-4,176,243.29
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	26,848.00	99,328.43	-19,900.00	-69,225.93
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	10,829.00	39,732.87	-10,892.00	-37,283.18
	676900	FUEL, DTL DOTHAN, AL	2,278.00	8,235.43	-2,278.00	-7,905.84
	679800	FUEL, DTL MONTGOMERY, AL	7,006.00	24,494.35	-7,006.00	-23,879.98
	25200	FUEL, MONTGOMERY, AL	155,382.00	556,110.76	-152,399.00	-538,585.91
			1,802,640.00	6,432,122.18	-1,401,873.00	-4,853,124.13

		Per Gallon		$3.5682		$3.4619
6/27/2008	24800	FUEL, BIRMINGHAM, AL	1,646,415.00	6,394,208.82	-1,999,526.00	-7,733,548.37
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	20,009.00	79,140.36	-26,957.00	-104,077.83
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	20,927.00	84,723.94	-20,927.00	-81,231.10
	676900	FUEL, DTL DOTHAN, AL	1,005.00	4,165.22	-1,005.00	-3,916.96
	679800	FUEL, DTL MONTGOMERY, AL	4,014.00	16,153.48	-4,014.00	-15,527.43
	25200	FUEL, MONTGOMERY, AL	180,434.00	700,594.58	-183,417.00	-709,787.75
			1,872,804.00	7,278,986.40	-2,235,846.00	-8,648,089.44
		Per Gallon		$3.8867		$3.8679
7/25/2008	24800	FUEL, BIRMINGHAM, AL	1,407,575.00	5,543,554.14	-1,400,634.00	-5,516,545.94
	25100	FUEL, DTL (RACK	24,813.00	100,256.83	-24,813.00	-98,606.44

		PICKUP) MOBILE, AL				
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	14,719.00	59,383.20	-14,719.00	-58,149.47
	676900	FUEL, DTL DOTHAN, AL	2,482.00	9,897.97	-2,482.00	-9,573.09
	25200	FUEL, MONTGOMERY, AL	149,880.00	594,915.60	-149,880.00	-591,580.94
			1,599,469.00	6,308,007.74	-1,592,528.00	-6,274,455.88
		Per Gallon		$3.9438		$3.9399
8/22/2008	24800	FUEL, BIRMINGHAM, AL	1,232,925.00	4,127,209.62	-1,206,101.00	-4,256,308.51
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	13,818.00	45,252.39	-13,818.00	-45,955.14
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	15,891.00	56,276.66	-15,891.00	-56,146.77
	679800	FUEL, DTL MONTGOMERY, AL	3,501.00	11,395.76	-3,501.00	-11,422.15
	25200	FUEL, MONTGOMERY, AL	125,365.00	425,089.57	-119,125.00	-414,682.96
			1,391,500.00	4,665,224.00	-1,358,436.00	-4,784,515.53

		Per Gallon		$3.3527		$3.5221
9/26/2008	24800	FUEL, BIRMINGHAM, AL	1,481,407.00	4,660,000.17	-1,468,029.00	-4,746,723.50
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	19,276.00	62,260.06	-19,276.00	-62,185.17
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	30,372.80	97,643.59	-30,372.80	-96,358.09
	25200	FUEL, MONTGOMERY, AL	224,618.00	709,084.46	-211,480.00	-677,750.26
			1,755,673.80	5,528,988.28	-1,729,157.80	-5,583,017.02
		Per Gallon		$3.1492		$3.2287
10/24/2008	24800	FUEL, BIRMINGHAM, AL	1,495,543.00	3,848,621.25	-1,422,529.00	-4,057,131.21
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	38,126.00	115,036.21	-38,126.00	-113,653.44
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	48,594.90	135,449.47	-48,594.90	-139,212.20
	25200	FUEL, MONTGOMERY, AL	114,476.00	303,239.85	-132,858.00	-383,977.21

			1,696,739.90	4,402,346.78	-1,642,107.90	-4,693,974.06
		Per Gallon		$2.5946		$2.8585
11/21/2008	24800	FUEL, BIRMINGHAM, AL	1,395,147.00	2,728,885.41	-1,411,572.00	-3,018,886.54
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	5,727.30	15,632.09	-5,727.30	-12,107.27
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	50,804.00	106,896.89	-46,803.00	98,821.75
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	13,505.00	29,054.09	-13,505.00	-28,427.44
	679800	FUEL, DTL MONTGOMERY, AL	8,009.00	18,049.93	-8,009.00	-16,614.54
	734800	FUEL, DTL, BRIDGEPORT, AL	5,088.00	12,046.82	-5,088.00	-10,801.26
	25200	FUEL, MONTGOMERY, AL	92,872.00	187,197.26	-93,868.00	-199,161.00
			1,571,152.30	3,097,762.49	-1,584,572.30	-3,187,176.30

		Per Gallon		$1.9717		$2.0114
12/26/2008	24800	FUEL, BIRMINGHAM, AL	1,471,792.00	2,172,418.82	-1,499,132.00	-2,456,212.32
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	31,707.00	51,920.27	-35,708.00	-59,833.51
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	12,832.00	19,527.46	-12,832.00	-19,611.67
	686000	FUEL, DTL BIRMINGHAM, AL	2,603.00	4,194.21	-2,603.00	-4,165.16
	734800	FUEL, DTL, BRIDGEPORT, AL	12,741.00	22,857.16	-12,741.00	-19,627.98
	25200	FUEL, MONTGOMERY, AL	143,974.00	222,558.14	-137,164.00	-224,396.17
			1,675,649.00	2,493,476.06	-1,700,180.00	-2,783,846.81
		Per Gallon		$1.4881		$1.6374

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1/23/2009	24800	FUEL, BIRMINGHAM, AL	1,177,454.00	1,670,920.62	-1,111,603.00	-1,564,634.43
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	3,704.00	9,889.68	-3,704.00	-5,217.04
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	21,000.00	29,688.99	-21,000.00	-30,016.62
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	17,733.00	30,248.75	-17,733.00	-24,989.51
	734800	FUEL, DTL, BRIDGEPORT, AL	4,305.00	7,494.57	-4,305.00	-5,964.05
	25200	FUEL, MONTGOMERY, AL	87,375.00	122,581.02	-87,363.00	-122,341.90
			1,311,571.00	1,870,823.63	-1,245,708.00	-1,753,163.55
		Per Gallon		$1.4264		$1.4074
2/20/2009	24800	FUEL, BIRMINGHAM, AL	1,260,781.00	1,697,459.21	-1,347,670.00	-1,891,725.64
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL)	4,333.00	6,125.78	-4,333.00	-5,763.36

		MOBILE, AL				
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	17,126.00	25,854.36	-17,126.00	-23,568.62
	717000	FUEL, DTL (SUPPLIER) MOBILE, AL	9,160.00	13,957.06	-9,160.00	-13,096.70
	734800	FUEL, DTL, BRIDGEPORT, AL	1,718.00	2,808.07	-1,718.00	-2,302.70
	25200	FUEL, MONTGOMERY, AL	101,425.00	139,869.45	-97,099.00	-136,182.20
			1,394,543.00	1,886,073.93	-1,477,106.00	-2,072,639.22
				$1.3525		$1.4032
3/27/2009	24800	FUEL, BIRMINGHAM, AL	1,646,246.00	2,010,717.51	-1,635,447.00	-2,046,571.67
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	25,155.00	33,817.12	-25,155.00	-31,107.56
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	38,336.00	49,502.99	-38,336.00	-47,316.95

	734800	FUEL, DTL, BRIDGEPORT, AL	8,490.00	12,824.99	-8,490.00	-10,471.18
	25200	FUEL, MONTGOMERY, AL	152,373.00	185,791.44	-163,521.00	-203,557.95
			1,870,600.00	2,292,654.05	-1,870,949.00	-2,339,025.31
				$1.2256		$1.2502
4/24/2009	24800	FUEL, BIRMINGHAM, AL	1,204,698.00	1,693,173.87	-1,289,432.00	-1,813,160.14
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	9,726.00	15,074.05	-9,726.00	-13,898.52
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	16,920.00	25,645.61	-16,920.00	-24,224.37
	734800	FUEL, DTL, BRIDGEPORT, AL	2,507.00	4,205.74	-2,507.00	3,537.02
	25200	FUEL, MONTGOMERY, AL	165,806.00	244,614.45	-156,150.00	-220,256.21
			1,399,657.00	1,982,713.72	-1,474,735.00	-2,068,002.22
				$1.4166		$1.4023

5/22/2009	24800	FUEL, BIRMINGHAM, AL	1,229,351.00	1,749,361.23	-1,230,872.00	-1,747,977.82
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	22,432.00	33,816.45	-22,432.00	-31,900.72
	734800	FUEL, DTL, BRIDGEPORT, AL	7,857.00	13,686.79	-7,857.00	-11,407.77
	25200	FUEL, MONTGOMERY, AL	96,978.00	142,400.57	-106,634.00	-151,782.71
			1,356,618.00	1,939,265.04	-1,367,795.00	-1,943,069.02
				$1.4295		$1.4206
6/26/2009	24800	FUEL, MONTGOMERY, AL	1,405,396.00	2,440,351.17	-1,418,421.00	-2,375,112.20
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	3,000.00	5,890.80	-3,000.00	-5,336.58
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	26,918.00	45,781.97	-26,918.00	-44,691.36
	679800	FUEL, DTL MONTGOMERY,	4,013.00	7,734.02	-4,013.00	-7,334.95

		AL				
	734800	FUEL, DTL, BRIDGEPORT, AL	5,666.00	11,576.27	-4,285.00	-7,439.03
	25200	FUEL, MONTGOMERY, AL	177,623.00	313,778.28	-177,623.00	-305,799.70
			1,622,616.00	2,825,162.51	-1,634,260.00	-2,745,713.82
				$1.7411		$1.6801
7/24/2009	24800	FUEL, BIRMINGHAM, AL	1,197,504.00	2,012,336.79	-1,076,696.00	-1,887,272.72
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	2,823.00	5,282.12	-2,823.00	-4,736.34
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	16,565.00	28,453.41	-16,565.00	-29,169.01
	734800	FUEL, DTL, BRIDGEPORT, AL	4,306.00	8,064.28	-5,687.00	-9,836.15
	25200	FUEL, MONTGOMERY, AL	94,018.00	163,868.60	-94,018.00	-165,685.82
			1,315,216.00	2,218,005.20	-1,195,789.00	-2,096,700.04

				$1.6864		$1.7534
8/21/2009	24800	FUEL, BIRMINGHAM, AL	1,154,024.00	2,167,434.00	-1,159,340.00	-2,113,703.63
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	7,112.00	14,883.32	-7,112.00	-13,387.64
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	6,736.00	12,244.36	-6,736.00	-12,001.10
	734800	FUEL, DTL, BRIDGEPORT, AL	6,004.00	13,464.46	-6,004.00	-11,285.10
	25200	FUEL, MONTGOMERY, AL	138,665.00	258,537.48	-138,665.00	-251,413.10
			1,312,541.00	2,466,564.02	-1,317,857.00	-2,401,790.57
				$1.8792		$1.8225
9/25/2009	24800	FUEL, BIRMINGHAM, AL	1,452,880.00	2,658,320.53	-1,470,760.00	-2,758,853.99
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL)	7,522.00	14,589.29	-7,522.00	-13,872.21

		MOBILE, AL				
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	37,730.00	70,177.87	-30,806.00	-57,328.06
	734800	FUEL, DTL, BRIDGEPORT, AL	10,453.00	22,018.02	-8,470.00	-15,651.53
	25200	FUEL, MONTGOMERY, AL	111,909.00	210,671.97	-108,118.00	-203,781.55
			1,620,494.00	2,975,777.68	-1,625,676.00	-3,049,487.34
				$1.8363		$1.8758
10/23/2009	24800	FUEL, BIRMINGHAM, AL	1,079,953.00	2,036,485.37	-1,063,054.00	-1,970,520.04
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	12,614.00	26,670.77	-8,186.00	-15,497.36
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	26,866.00	50,790.85	-33,790.00	-62,563.15
	734800	FUEL, DTL, BRIDGEPORT, AL	3,829.00	8,686.09	-5,812.00	-11,147.46

	25200	FUEL, MONTGOMERY, AL	97,868.00	183,011.23	-101,659.00	-188,348.83
			1,221,130.00	2,305,644.31	-1,212,501.00	-2,248,076.84
				$1.8881		$1.8541
11/20/2009	24800	FUEL, BIRMINGHAM, AL	1,127,625.00	2,289,612.65	-1,137,222.00	-2,316,091.74
	728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	10,798.10	23,806.03	-15,226.10	-30,985.35
	25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	20,946.00	42,248.78	-20,946.00	-42,624.30
	734800	FUEL, DTL, BRIDGEPORT, AL	7,871.00	18,327.89	-7,871.00	-16,070.82
	26100	FUEL, MONTGOMERY, AL	89,356.00	184,057.52	-87,308.00	-178,008.98
			1,256,596.10	2,558,052.87	-1,268,573.10	-2,583,781.19
				$2.0357		$2.0368
12/25/2009	24800	FUEL, BIRMINGHAM, AL	1,572,810.00	3,101,224.86	-1,671,140.00	-3,336,332.65

728200	FUEL, DTL (MCDUFFIE COAL TERMINAL) MOBILE, AL	4,230.00	9,074.62	-4,230.00	-8,538.45
25100	FUEL, DTL (RACK PICKUP) MOBILE, AL	43,000.00	86,664.23	-43,000.00	-85,785.18
734800	FUEL, DTL, BRIDGEPORT, AL	7,922.00	18,656.28	-7,922.00	-15,965.56
25200	FUEL, MONTGOMERY, AL	124,247.00	249,211.74	-126,295.00	-251,438.54
		1,752,209.00	3,464,831.73	-1,852,587.00	-3,698,060.38
			$1.9774		$1.9962
				2009	17,543,536 S-3
		58,989,351.70	132,563,388.82	-59,078,557.70	-134,007,700.31

PETITIONER'S BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONERS

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September 9, 2014

QUESTIONS PRESENTED

1. Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales and use tax but grants exemptions from the tax to the railroads' competitors.

2. Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

PARTIES TO THE PROCEEDINGS

The caption identifies all parties to this proceeding.

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BRIEF OF THE PETITIONERS

The Alabama Department of Revenue and its Commissioner, Julie Magee, respectfully ask this Court to reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (CA11 2013), and reproduced at Pet. App. 1a-29a. The district court's opinion is reported as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 892 F. Supp. 2d 1300 (N.D. Ala. 2012), and reproduced at Pet. App. 30a-66a.

JURISDICTION

Respondent CSX Transportation, Inc. ("CSX") filed this action against the Department and Commissioner under the 4-R Act, which gives district courts subject-matter jurisdiction. *See* 49 U.S.C. § 11501(c). The district court entered final judgment in the Department and Commissioner's favor. *See* Pet. App. 68a-69a. CSX took a timely appeal, and a divided panel entered a final judgment reversing the district court on July 1, 2013. *See* Pet. App. 1a-17a.

This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). Justice Thomas granted the Petitioners an extension, up to and including October 30, 2013, to file the petition. *See* Pet. App. 95a. The Petitioners timely filed a petition on that date.

STATUTORY PROVISION INVOLVED

49 U.S.C. §11501. Tax discrimination against rail transportation property.

. . .

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

INTRODUCTION

Congress enacted 49 U.S.C. § 11501 to protect railroads from state and local tax schemes that target railroads for taxes and tax rates that few other businesses must pay. CSX has never argued that Alabama's sales and use tax works that way. Instead, CSX argues that it is being discriminated against because certain of its competitors are exempt from Alabama's generally applicable sales and use tax when they consume diesel fuel. This is discrimination, CSX argues, even though almost everyone else in Alabama must pay the sales and use tax on supplies for their businesses, just as they do when they purchase clothes, toothpaste, or a magazine.

The court of appeals erred by accepting this argument and comparing CSX to the wrong group of taxpayers. As Justices Thomas and Ginsburg explained last time, it is not "discrimination against a railroad" under the 4-R Act to treat railroads the same as other commercial taxpayers, even if some subset of taxpayers is treated better than average. To make a *prima facie* case under 49 U.S.C. § 11501(b)(4), a railroad must instead allege that it pays a tax that the broad class of other business and commercial taxpayers does not have to pay. That is the only kind of dissimilar treatment subject to judicial scrutiny under subsection (b)(4).

But, even if the court of appeals were correct to compare the taxation of CSX to the taxation of its competitors, the court of appeals erred by refusing to consider Alabama's justifications for treating railroads differently. The Court has explained that dis-

similar treatment is not the same thing as "discrimination." Instead, dissimilar treatment becomes "discrimination" only if a government does not offer "a sufficient justification for declining to provide the exemption at issue to rail carriers," such as a reason "having nothing to do with railroads." *CSX Transp., Inc. v. Ala. Dep't of Rev.*, 131 S. Ct. 1101, 1109 n.8 (2011). The court of appeals violated these principles, ending the inquiry at dissimilar treatment without evaluating Alabama's justifications. Pet. App. 14a-16a.

Ultimately, the lower court's answer to the second question exacerbates the problems with its answer to the first. The answer to the first question should be "no," because the railroads are protected if they are subject to taxes that other commercial and industrial taxpayers also must pay. But, at the very least, the answer to the second question must be "yes," such that a state can justify differential tax treatment under a relatively deferential standard. The contrary result that CSX seeks would transform railroads into most-favored taxpayers able to access any exemption or deduction afforded to another business. Favoring railroads over all other taxpayers was most assuredly not the goal of the 4-R Act, and the Court should reverse on the first or second question presented.

STATEMENT

This case involves a typical sales and use tax. Like many other states, Alabama taxes goods that businesses and people purchase or use. *See* Ala. Code §§ 40-23-2 (1) & -61(a). The sales and use tax is 4%.

Alabama's sales and use taxes are complementary, not duplicative: Alabama imposes a use tax *only* when a taxpayer has not already paid the sales tax. *See* Ala. Code §§ 40-23-2(1), 40-23-61(a). Revenues from the sales and use tax are used for various purposes statewide, but most go to Alabama's education fund to support public schools. *See* Ala. Code § 40-23-35; J.A. 65, 92. Certain Alabama cities and counties also collect sales and use tax.[1]

A. Alabama's taxes on diesel fuel

Alabama imposes its generally applicable 4% tax on diesel fuel that is used for any nonexempt purpose—for instance, to power engines and generators used in construction, refrigeration, and railroading. The sales and use tax is usually collected by retailers at the point of sale and then remitted to the Department of Revenue, Ala. Code § 40-23-26(c), but the large railroads hold a direct pay permit that allows them to pay taxes directly to the Department itself. J.A. 27-28, 43. This means that a railroad can buy diesel fuel from a wholesaler, store it at one of its depots, and assess the tax on the value of the fuel when it is "withdraw[n]" from the tank. *See* Ala. Code § 40-23-1(a)(10) (defining "retail sale" for taxpayers that buy from wholesalers).

CSX sued because the sales and use tax does not apply to diesel fuel used on roads or to diesel fuel

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[1] These Alabama counties and cities are not parties to this litigation, but CSX and other railroads have separate lawsuits and refund actions pending against them.

used by water carriers engaged in interstate transportation.

1. The motor fuels exemption

For diesel fuel used on roads, Alabama imposes a motor fuels tax of 19¢ per gallon. *See* Ala. Code § 40-17-325(a)(2). To prevent double taxation, all fuel that is subject to this tax—regardless of who buys it or how they use it—is exempt from the sales and use tax. *See id.* § 40-17-325(b). Conversely, Alabama exempts all off-road diesel fuel from the motor fuels tax, regardless of the purchaser. Ala. Code § 40-17-329(a)(3). The motor fuels tax helps fund road maintenance. *See id.* §§ 40-17-361 & 40-17-362; J.A. 44.

a. Alabama has taxed on-road diesel fuel differently than off-road diesel fuel for more than 70 years. This distinction began when Congress enacted the Hayden-Cartwright Act of 1934, forcing states to impose and spend highway-related taxes on road maintenance as a condition of federal highway funding. *See generally* Ross. D. Netherton, *Intergovernmental Relations Under the Federal-Aid Highway Program*, 1968 Urb. Law Ann. 15 (1968).[2] By the time the 4-R Act was enacted in 1976, every state levied a distinct motor fuels tax for on-road usage. To prevent double taxation, 43 states exempted "[g]asoline and, in most, but not all, cases, other motor fuels subject to the motor fuels tax" from the state's sales tax. John F. Due & John L. Mikesell,

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[2] Available at http://digitalcommons.law.wustl.edu/urbanlaw/vol1968/iss 1/3 (last visited Sept. 4, 2014).

Sales Taxation: State and Local Structure and Administration 77 (1983).

Congress repealed Hayden-Cartwright in 1998, but federal law still perpetuates the distinction between on-road fuels and off-road fuels. The United States levies a 24.4¢ per gallon excise tax on diesel fuel used on highways, 26 U.S.C. § 4081(a)(2), and requires that diesel fuel designated for off-road usage, and thus exempt from the federal tax, be "indelibly dyed" for identification purposes, 26 U.S.C. § 4082(a)(2). To support this taxing regime, it is illegal under state and federal law to use dyed diesel fuel on the road. *See* 26 U.S.C. § 6715; Ala. Code § 40-17-350(*l*)(4)(d). *See also* J.A. 43-45, 77-78. But it is not illegal to use clear diesel fuel off the road.

b. Trains do not operate on roads, so they have the option to power their engines with *either* dyed diesel fuel subject to the sales tax *or* clear diesel fuel subject to the motor fuels tax. The district court found that railroad companies benefit from this arrangement. Pet. App. 56a.

CSX's tax liability would actually be greater if it were required to pay the state motor fuel tax instead of the state sales tax. *See id.* It is undisputed that, in recent years, CSX has paid a lower tax amount per gallon for off-road diesel fuel than it would have paid for a gallon of on-road diesel fuel. J.A. 103-05. The smallest difference was about 3¢, the largest difference was about 14¢, and the average difference was about 11¢. But every year, the amount of the state motor fuel tax per gallon of on-road diesel fuel has exceeded the amount of state sales tax per gallon of off-road diesel fuel. *Id.*

2. The interstate water carriers' exemption

The second exemption at issue in this litigation is one that Alabama allows for water carriers "engaged in foreign or international commerce or in interstate commerce." Ala. Code § 40-23-4(a)(10). The Alabama Code exempts these water carriers, such as barges and cargo ships, from paying the sales and use tax on diesel fuel. *See* Ala. Code §§ 40-23-4(a)(10) & -62(12); *see also* J.A. 44. But water carriers do pay tax on fuel used for intrastate shipments. J.A. 53, 91.

This is a common exemption[3] that has been in the Alabama Code for more than 50 years. *See* Act of Aug. 18, 1959, No. 99, § 789(*l*), 1959 Ala. Acts 295, 297. When this exemption was placed into the Alabama Code, "the most prolific source of exemptions from sales and use taxes" among all the states was "in the field of interstate commerce . . . [due to t]he constitutional limitations against burdening or interfering with the flow of commerce between the States." George D. Brabson, *Analysis of Sales and Use Tax Exemptions—with Comment as to More Uniform Applications*, 9 Vand. L. Rev. 294, 300 (1956). Thus, the most likely explanation for the water carriers' exemption is that, as the Iowa Supreme Court

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[3] Other states that also exempt fuel used for interstate water transportation include **Georgia**, Ga. Code Ann. § 48-8-3(17), **South Carolina**, S.C. Code Ann. § 12-36-2120(13), **Louisiana**, La. Rev. Stat. Ann. § 47:305.1(B). **Massachusetts**, Mass. Gen. Laws ch. 64H, § 6(o), **New Jersey**, N.J. Stat. Ann. § 54:32B-8.12, **New York**, N.Y. Tax Law § 1115(8), **Pennsylvania**, 72 Pa. Cons. Stat. § 7204(16), **Texas**, Tex. Tax Code Ann. § 151.329(4), and **Virginia**, Va. Code Ann. § 58.1-609.3(4).

once explained in analyzing a similar exemption, "[a]t one time barges in navigable waters were considered immune from state taxation of fuel by virtue of the Commerce Clause." *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 347 (Iowa 1983) (citing *Helson & Randolph v. Kentucky*, 279 U.S. 245, 251 (1929)).

In fact, interstate commerce on navigable waterways has received special tax treatment since the founding of this country. The authors of the Federalist Papers supported the elimination of state taxes on interstate commerce by water. *See, e.g.*, The Federalist No. 42 (Madison). And the Congressional Act of 1819 admitting the State of Alabama to the Union included the condition that "all navigable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, *without any tax, duty, impost or toll therefor, imposed by the said state.*" Res. of Mar. 2, 1819, 15th Cong. (1819), 3 Stat. 489, 492 (emphasis added). The people of Alabama accepted this condition, and it is enshrined in the state Constitution. *See* Ala. Const. art. I, § 24 ("That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll . . .").

For its part, the federal government also treats river or "inland" water carriers differently from trucking companies and railroads with respect to diesel fuel taxes. Unlike operators of trains or trucks, water carriers pay a fuel tax determined by combining "the Inland Waterways Trust Fund financing rate," "the Leaking Underground Storage Tank Trust

Fund financing rate," and "the deficit reduction rate." 26 U.S.C. § 4042(b)(1). Since 2006, the effective tax rate per gallon of diesel fuel used by inland water carriers has been 20.1¢. *Id.* § 4042(b)(2). Most of those taxes go toward "construction and rehabilitation expenditures for navigation on the inland and coastal waterways of the United States." *Id.* § 9506(c)(1).

Finally, the Army Corps of Engineers maintains the navigable rivers and other inland waterways in Alabama. *See* U.S. Army Corps of Engineers, *Tennessee-Tombigbee Waterway*;[4] U.S. Army Corps of Engineers Lock Performance Monitoring System.[5] The federal government is responsible for "100 percent" "of the cost of operation and maintenance of any project for navigation on the inland waterways." 33 U.S.C. § 2212(b).

B. Procedural history

CSX brought this action in the Northern District of Alabama against the Alabama Department of Revenue and its Commissioner. Pet. App. 30a-31a. CSX alleges that Alabama law violates the 4-R Act because rail carriers pay the sales and use tax on their purchases of diesel fuel while motor and water carriers do not. *Id.* at 31a, J.A. 18-20.

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[4] Available at http://www.sam.usace.army.mil/Missions/CivilWorks/Recreation/TennesseeTombigbeeWaterway/Navigation.aspx (last visited Sept. 4, 2014).

[5] Available at http://corpslocks.usace.army.mil (last visited Sept. 4, 2014).

The 4-R Act contains four subsections prohibiting state and local tax authorities from discriminating against railroads. *See supra* at 2 (quoting 49 U.S.C. § 11501(b)). The first subsection prohibits those governments from assessing railroad-property value at a ratio that is higher than the one used for "other commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(b)(1). Correspondingly, subsection (b)(2) precludes those governments from levying and collecting taxes based on the assessments prohibited in subsection (b)(1). *Id.* § 11501(b)(2). Subsection (b)(3) bars these governments from levying certain property taxes on railroads at a rate exceeding the one used for "commercial and industrial property in the same assessment jurisdiction." *Id.* § 11501(b)(3). The final provision, subsection (b)(4), makes it illegal for governments to "[i]mpose another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

CSX argues that Alabama's sales and use tax is "another tax that discriminates against" railroads in violation of subsection (b)(4). CSX's complaint seeks, among other things, an injunction prohibiting the Alabama Department of Revenue and its Commissioner from collecting the tax from CSX. Pet. App. 31a; J.A. 19.

1. This Court's decision on the threshold question.

The lower courts initially dismissed this action in light of Eleventh Circuit precedent, which held that the Act does not support challenges to exemptions from sales and use taxes granted to third parties. *See Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, 550 F.3d

1306, 1314-15 (CA11 2008). Those precedents were predicated on this Court's decision in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994). In *ACF Industries*, the Court held that third-party *property tax* exemptions were not subject to challenge under subsection (b)(4) of the Act. 510 U.S. at 345-48. The lower courts applied this reasoning to the railroad's claim that Alabama was discriminating against it by declining to exempt off-road diesel fuel from the sales and use tax and held that such a claim was not cognizable.

This Court granted certiorari and reversed. *See CSX Transp.*, 131 S. Ct. 1101. The majority emphasized the limited nature of its decision, explaining that it was not deciding whether "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114. The Court likewise reserved the question of whether the lower courts "must compare the taxation of CSX not merely to direct competitors but to other commercial entities as well" in determining whether exemptions amount to "discrimination." *Id.* at 1107 n.5. Ultimately, the Court decided to "leave these and all other issues relating to whether Alabama actually discriminated against CSX to the trial court on remand to address as and when it wishes." *Id.* The Court instead confined its holding to the threshold proposition "that CSX may challenge Alabama's sales and use taxes as 'tax[es] that discriminat[e] against . . . rail carrier[s]' under § 11501(b)(4)." *Id.* at 1114 (alterations in original).

Justice Thomas, joined by Justice Ginsburg, wrote a separate opinion. *See id.* at 1114-20 (Thom-

as, J., dissenting). Although these Justices agreed with the majority's answer to the threshold question, they dissented from the Court's decision to remand the case for further proceedings. *See id.* at 1114-15. They would have addressed an additional question, left open by the majority, of the appropriate standard for gauging discrimination. They would have held that exemptions do not "discriminate[]" against a rail carrier so long as they do not single out or target rail carriers as compared to the general class of commercial and industrial taxpayers as a whole. *See id.* at 1115-17. Because CSX did not allege that Alabama's tax works that way, these Justices would have held that CSX's complaint was due to be dismissed. *See id.* at 1117.

2. Proceedings on remand

On remand, the state defendants argued, among other things, that railroads are treated no differently than other general commercial and industrial taxpayers and that motor carriers pay the motor fuels tax. Pet. App. 70a-81a.

a. The district court's decision The district court held a bench trial. After looking at the railroads' competitors in "all relevant respects," the court concluded that CSX had not proved the sales and use tax to be discriminatory. *Id.* at 63a, 66a. Instead, the court found the exemptions were "sufficiently justified" and that "rail carriers are not unjustifiably disfavored as it relates to the purchase and use of diesel fuel." *Id.* at 58a, 66a.

First, the district court found that Alabama's exemption for on-road diesel fuel was not discriminato-

ry against railroads. The district court held that "motor carriers receive an exemption from paying Alabama's sales and use taxes on diesel fuel *because* they pay a comparable excise tax on this fuel, a tax not imposed on rail carriers." *Id.* at 57a. "The evidence demonstrates that from January 26, 2007 through December 25, 2009, motor carriers paid more per gallon of diesel fuel (average price per gallon + 19¢ per gallon) than rail carriers (average price per gallon + 4% sales tax per gallon)." *Id.* at 56a. Put simply, Alabama's tax scheme offers "no favoritism to motor carriers as opposed to rail carriers." *Id.* at 58a.

Further, the district court held that any claim of discrimination based on Alabama's discretionary spending of its revenues from these various taxes to build and maintain roads "misses the mark." The court explained that the comparison is unjustified—railroads operate on a private network, but motor carriers operate on *public* roads. *Id.* at 58a. Thus, the court found that "any benefit the motor carriers receive from the well maintained roads is due simply to the fact that the state must maintain the roads for the general public." *Id.* at 58a-59a.

Second, the district court held that the exception for interstate and international water carriers did not discriminate against CSX. First, as an evidentiary matter, CSX did not establish any "discriminatory effect as it relates to water carriers." Pet. App. at 63a-64a. There is, for example, no evidence that any interstate water carriers regularly refuel in Alabama such that they would be subject to the sales and use tax in the same way CSX is. *See id.* at 64a.

Second, CSX did not address the state's dormant and international commerce clause justifications for not taxing the sale of diesel fuel to water carriers engaged in interstate or international commerce. *Id.* at 64a-65a.

b. The court of appeals' decision. On appeal, the Court of Appeals for the Eleventh Circuit reversed the district court's decision and concluded that the sales and use tax is discriminatory. *See* Pet. App. 2a. The court rejected the rule proposed by Justices Thomas and Ginsburg, holding instead that a state "discriminates" against railroads under the 4-R Act when it exempts their competitors from paying a tax, even if the state does not exempt commercial and industrial taxpayers more generally. *See id.* at 11a-15a. The court of appeals also rejected the district court's reasoning, holding that "exempting CSX's main competitors from the state's sales tax is discriminatory as to rail carriers" without evaluating the state's justifications for doing so. *Id.* at 2a. In concluding that Alabama's sales and use tax violated the 4-R Act, the court refused to consider whether the motor fuels tax could justify the state's exemption because the "fairness of those arrangements is too difficult and expensive to evaluate." *Id.* at 13a, 16a (internal quotation marks omitted).

Judge Cox dissented. He agreed with his colleagues "that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. But he would have held that the "exemption for interstate motor carriers" was lawful because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* at 18a. None-

theless, he believed that "the district court improperly placed the burden on CSX" to prove the water carrier exemption's discriminatory effect, so he would have "remand[ed] for reconsideration as to interstate water carriers." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Section 11501(b)(4) of the 4-R Act is concerned with taxes that are imposed on railroads that are not imposed on the general class of commercial and industrial taxpayers. It does not subject to judicial scrutiny taxes that merely treat railroads differently than their interstate competitors.

A. The text and structure of the 4-R Act indicate that subsection (b)(4) requires courts to scrutinize taxes that are imposed on railroads but not the general class of commercial and industrial taxpayers. Subsection (b)(4) draws its meaning from the surrounding subsections and the structure of the Act as a whole. There are three relevant considerations.

First, the introduction to section 11501(b) explains that Congress meant to prohibit acts that "discriminate against interstate commerce." A reading of the statute that discourages states from treating interstate carriers more favorably than in-state taxpayers is inconsistent with this focus.

Second, the Act prohibits "another tax" that discriminates against railroads, not "any tax" that discriminates against railroads. The word "another" indicates that Congress intended to incorporate the express comparison class it provided in subsections

(b)(1), (b)(2), and (b)(3). Each of those subsections address only those taxes that treat railroads worse than the general class of commercial and industrial taxpayers. None is focused on a railroad's competitors.

Third, this section of the 4-R Act was modeled on the act that created the Interstate Commerce Commission. That commission was charged with setting railroad rates to eliminate disparities between intrastate travel and interstate travel. This conscious similarity between the two Acts underscores that Congress intended to compare railroads to the general class of in-state businesses.

There is no similar textual argument that supports the court of appeals' decision to compare CSX to its interstate competitors. Instead, the court of appeals reasoned that the comparison class could change from case to case. Sometimes it would include other commercial and industrial taxpayers; sometimes it would not. This Court has previously described similar reasoning as "dangerous."

B. The history and purpose of the Act also support the conclusion that the Act does not protect railroads from being treated differently than their interstate competitors.

The progress of the Act through Congress shows that no one believed it would require states to grant most favored taxpayer status to railroads. Representatives of the railroads expressly disclaimed any goal other than parity with in-state businesses. And railroads' competitors, including truckers and water carriers, lobbied in support of the Act. These groups

would not have rallied in support of the 4-R Act if it were intended to undermine their own tax preferences.

Comparing railroads to the class of general commercial and industrial taxpayers also solves the underlying problem of railroad over-taxation that led to the 4-R Act. This broad-based comparison class allows courts to scrutinize taxes that single out the railroads. But it also gives states and local governments the ability to tax railroads under the same neutral, generally-applicable provisions that they apply to other businesses. That rule is most consistent with the balance that Congress intended between the railroads and the states.

C. This analysis also has the benefit of providing a clear rule for states to follow and for courts to apply. If a tax applies to a wide variety of general commercial and industrial taxpayers, as well as railroads, it is not subject to judicial scrutiny under the 4-R Act. Alternative ways of answering the comparison-class question lead to unpredictability and unfairness.

Tennessee's 4-R Act litigation provides a good example of the problems endemic to the court of appeals' approach. In the past, Tennessee taxed railroad fuel and water-carrier fuel the same, but on-road diesel fuel differently. After the railroads successfully sued under the 4-R Act over the difference between their fuel tax and the on-road fuel tax, Tennessee changed its law to tax railroads the same as truckers—*i.e.*, giving railroads the tax treatment they said they preferred. The railroads have now sued again, claiming that it is discrimination not to

tax them the same as water carriers, which is how they were taxed before.

II. The court of appeals compounded its error by refusing to consider Alabama's justifications for taxing truckers and water carriers differently. The court of appeals' reasoning is inconsistent with the way discrimination is evaluated in comparable contexts. Under the right standard, Alabama's treatment of CSX is justified.

A. The Court has previously explained that a railroad can win a 4-R Act challenge only if the state does not have a "sufficient justification" for treating the railroad differently. The appropriate inquiry asks whether the government's policy is supported by a rational basis having nothing to do with railroads.

The Equal Protection Clause, Commerce Clause, and Supremacy Clause apply anti-discrimination principles to state taxation and inform what this Court meant by "sufficient justification." There are two important similarities among these areas of the law. First, a court must evaluate a state's proffered justification for taxing two groups differently; mere differential treatment is not enough to show discrimination. Second, in these comparable areas of the law, it is a sufficient justification if a tax is "complementary," meaning that it is offset by a tax on the purportedly favored group.

B. The court of appeals' reasoning is inconsistent with these precedents. As an initial matter, this Court has previously warned that the discrimination inquiry under the 4-R Act will be "knotty" and "diffi-

cult." It is thus no answer for the court of appeals to protest that it is too difficult to compare one tax to another.

Moreover, the precedents that the court of appeals invoked to support its decision are inapposite. As the district judge and dissenting judge below explained, those precedents stand for the proposition that a court cannot weigh the abstract fairness of imposing a special tax on a select group of taxpayers that no other taxpayer has to pay. Here, however, the justification is different: the truckers pay a comparable tax on the same taxable event, the purchase of diesel fuel.

Finally, the comparison between taxes is very easy in this case. The railroads can choose which tax they pay. They will never be compelled to pay more in sales and use tax than the truckers pay in motor fuels tax.

C. Under the right standard, the district court was correct that the dissimilar treatment of railroads, truckers, and water carriers is adequately justified. Truckers do not pay the sales and use tax for on-road diesel fuel because that fuel is subject to a different, higher excise tax. Interstate water carriers are exempt from paying the sales and use tax because of deeply rooted historical barriers to the taxation of interstate commerce by water, such as the dormant commerce clause, and the predominant federal influence over navigable waterways. Moreover, the only evidence in the record about water carriers tends to show that the tax exemption for interstate water carriers has no effect on railroads.

ARGUMENT

I. A railroad does not make a prima facie case under the 4-R Act by comparing its taxation to the taxation of its competitors.

The first question presented asks whether Alabama is treating the railroads dissimilarly as compared to a relevant class of other taxpayers. When this case was last before it, the Court explained that giving a tax exemption to a *favored* "group" is no different in substance than imposing a higher base tax rate on a *disfavored* "group." *CSX Transp.*, 131 S. Ct. at 1108. Accordingly, the Court held that a railroad could challenge a sales tax as discriminatory because of the tax's exemptions. But the Court declined to decide whether interstate competitors are a proper "group" with which to compare railroads. *See id.* at 1109 n.8.

Justices Thomas and Ginsburg went further and gave the right answer to this question: the 4-R Act subjects to judicial scrutiny the unfavorable treatment of railroads as compared to commercial and industrial taxpayers generally, not one or two exempt businesses. In this way, the 4-R Act requires judicial scrutiny of schemes that target or single out railroads for a tax that other taxpayers do not have to pay. *See id.* at 1115 (Thomas, J., dissenting). This view of subsection (b)(4) comports with the text, structure, history, and purpose of the Act. And it is the only rule that leads to fair and predictable results.

A. The text and structure of section 11501 establish that general commercial and industrial taxpayers are the proper comparison class.

The text and structure of section 11501 point to a comparison class of general commercial and industrial taxpayers. "[T]he word 'discrimination' is inherently" ambiguous. *Guardians Assoc. v. Civil Serv. Comm'n,* 463 U.S. 582, 592 (1983) (opinion of White, J.). Because the term is ambiguous, the Court must look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also ACF Indus.*, 510 U.S. at 340 (relying on structure of subsections (b)(1)-(3) to interpret (b)(4)).

And context here, in the form of the 4-R Act's text and structure, makes the appropriate comparison class clear. Subsection (b)(4)'s phrase "discriminates against a rail carrier" gains its meaning from the rest of section 11501. As the Court stated in *ACF Industries*, subsection (b)(4) cannot be properly understood "in isolation," but must be interpreted in light of "the structure of [section 11501] as a whole." 510 U.S. at 339-40. "A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter." 2A Norman J. Singer, *Statutes and Statutory Construction* §46:05 (7th ed. 2007).

As detailed below, three characteristics of the rest of the statute help define discrimination in subsection (b)(4). First, the statute tells us that each of the

four subsections forbid only those acts that "discriminate against interstate commerce." Second, each subsection prohibits the imposition of a proportionately heavier tax burden on interstate rail carriers than the general mass of commercial and industrial taxpayers. Third, Congress used nearly identical language in the Interstate Commerce Act to protect interstate businesses from discrimination. A comparison class of general commercial and industrial taxpayers is most consistent with these features.

1. The statute forbids discrimination against interstate commerce.

The proper starting point is section 11501(b)'s opening clause:

> (b) *The following acts unreasonably burden and discriminate against interstate commerce*, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

49 U.S.C. § 11501(b) (emphasis added). As emphasized, section 11501(b) binds its four subsections together by declaring that each prohibits an act that "discriminates" in the same manner: by "discriminat[ing] against interstate commerce."

Congress did not come up with the term "discriminates against interstate commerce" by itself. Instead, that term comes from a long line of this Court's dormant-commerce-clause cases in which this Court held that a tax or regulation may be unconstitutional when it treats interstate businesses *worse than intrastate businesses*: "A State may not impose a tax which discriminates against interstate com-

merce by providing a direct commercial advantage to local business." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995) (internal quotation marks and alterations omitted).[6] We have found no case where this Court has held that a state "discriminates against interstate commerce" by treating one interstate competitor better than another, *i.e.*, based on a "competitor comparison class."

In fact, a comparison class of railroad competitors strips section 11501(b)'s phrase "discriminate against interstate commerce" of its ordinary meaning. To "discriminate against" means, at the very least, to disfavor. And it is a non sequitor to say that a state is "discriminat[ing] against interstate commerce" by giving a tax *advantage* to a method of conducting interstate commerce, such as interstate water carriers, that is not available to the general public. The phrase "discriminates against interstate commerce" instead invites the court to compare the taxation of railroads with the taxation of local businesses.

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[6] *See also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) ("measures designed to benefit in-state economic interests by burdening out-of-state competitors clearly discriminate against interstate commerce"); *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring) ("the present statute discriminates against interstate commerce by applying a disadvantageous rule against nonresidents"); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) ("erecting an economic barrier protecting a major local industry against competition from without the State . . . plainly discriminates against interstate commerce").

2. "Another tax" is a reference to the kinds of taxes disallowed by the preceding subsections.

Subsections (b)(1)-(b)(3) also share a common characteristic: A state "discriminates against a rail carrier" only by forcing the carrier to pay a proportionately heavier tax than the general mass of commercial and industrial taxpayers. Subsections (b)(1) and (b)(2) forbid states from assessing a rail carrier's property at a higher percentage of fair market value than the assessed value of other "commercial and industrial property" in the state, and from levying a tax based on such an assessment. And subsection (b)(3) forbids states from subjecting interstate rail carrier property to a higher tax rate than the rate applied to other "commercial and industrial property" in the state. *See also* 49 U.S.C. §§ 11501(a)(4) (defining "commercial and industrial property"), 11501(c) (requiring courts to determine the "true market value of all other commercial and industrial property"). Under any of these subsections, if the rail carrier is taxed proportionately with other businesses in the state—*i.e. if the rail carrier is treated the same as local businesses*—then no discrimination has occurred.

"Discriminate" under subsection (b)(4) gains its meaning by reference to subsections (b)(1)-(b)(3). *See Kucana v. Holder*, 558 U.S. 233, 246-47 (2010) ("The clause (i) enumeration, we find, is instructive in determining the meaning of the clause (ii) catchall."). The word "another" literally means "of the same

kind."[7] And, as the Court has explained, "another" here is synonymous with the words "any other" that it replaced during recodification. *CSX Transp.*, 131 S. Ct. at 1107 n.6. The phrase "*another* tax that discriminates" thus harkens back to the other three subsections and the specific comparison-class language found therein. 49 U.S.C. § 11501(b)(4) (emphasis added). "Another tax that discriminates" under subsection (b)(4) means a state tax that forces interstate rail carriers to pay a heavier tax than the general mass of commercial and industrial taxpayers.

This reasoning is consistent with this Court's decision in *CSX Transportation*. Even though the Court held that the prohibition in subsection (b)(4) of "another tax" is not limited to the kind of property taxes listed in subsections (b)(1)-(3), *see CSX Transp.*, 131 S. Ct. at 1113, the Court did not hold that those provisions fail to inform the meaning of (b)(4). And the Seventh Circuit—which is the only other court of appeals to consider this issue post-*CSX Transportation*—correctly followed this method of giving meaning to subsection (b)(4). "[I]n light of the approach taken in the first three subsections of the 4-R Act,

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[7] *See, e.g.*, New Oxford American Dictionary 65 (3d ed. 2010) (primary definition: "used to refer to an additional person or thing of the same type as one already mentioned or known about"); Merriam-Webster's Collegiate Dictionary 51 (11th ed. 2007) (most recent sense: "being one more in addition to one or more of the same kind"); Random House Webster's Unabridged Dictionary 85 (2d ed. 2001) (primary definition: "being one more or more of the same"); Oxford English Dictionary, Vol. I, 495 (2d ed. 1989) (first main sense: "a second, further, additional").

which all directly or indirectly look to other commercial and industrial property," the Seventh Circuit explained, "it is the functional, middle group of all other commercial and industrial taxpayers" that forms the proper comparison class under subsection (b)(4). *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496, 509 (CA7 2011) (citations and internal quotations omitted). The Seventh Circuit's reasoning is right: the use of "another tax" indicates that subsection (b)(4) involves the same kind of comparison as subsections (b)(1)-(3).

3. Congress used nearly identical language in the Interstate Commerce Act.

A comparison of the text of the 4-R Act with the text of a contemporaneous statute also demonstrates that Congress tied interstate rail carriers' tax fate to the general mass of commercial and industrial taxpayers.

Again, the 4-R Act only prohibits "acts [that] unreasonably burden and discriminate against *interstate commerce*." 49 U.S.C. § 11501(b) (emphasis added). But, when Congress passed the 4-R Act, section 11501(b)'s prohibition clause read a little differently; it proscribed acts that "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." *See* Br. App. 8a. Nearly identical language existed in then-section 13(4) of the Interstate Commerce Act. *Id.* at 4a. Specifically, the Interstate Commerce Act provided that the Interstate Commerce Commission could set railroad rates when it found "any undue, unrea-

sonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce." *See id.*

Section 13(4) granted the Interstate Commerce Commission the authority to proscribe *intra*state passenger fares otherwise set by states "when intrastate revenues fall short of producing their fair proportionate share of required total revenues, [and thus] work an undue discrimination against interstate commerce." *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Illinois*, 355 U.S. 300, 306 (1958). Section 13(4) also allowed the ICC to "remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce." *Id.* In other words, section 13(4) granted the ICC the limited power to equalize the playing field between interstate and intrastate business—just as Congress granted courts authority to level the playing field between interstate rail carriers and the general mass of businesses in section 11501.

The similarities between the Interstate Commerce Act and the 4-R Act are no coincidence. Congress intentionally borrowed the language of section 13(4) when writing section 11501. *See* S. Rep. No. 90-1483, at 8-9 (1968); *State Tax Discrimination Against Interstate Carrier Property: Hearing on S. 2289 Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 91st Cong. 11 (1969) (hereinafter "1969 Hearings") (statement of Philip M. Lanier, Vice President, Law, Louisville & Nashville R.R. Co.). That Congress transplanted section 13(4)'s language regarding discrimination against interstate commerce into section 11501 shows that Congress intended the provisions to solve a similar problem:

treating interstate business worse than local business.

4. No comparable textual analysis supports the court of appeals' approach.

Finally, there is no comparable textual analysis that supports the use of a comparison class of railroad competitors. It is not a persuasive response to the text of the statute to maintain, as have the Eighth and Eleventh Circuits, that railroads' competitors must be the appropriate class because "Congress 'specifically chose to omit any reference to a comparison class in subsection [(b)(4)].'" Pet. App. 11a-12a n.4 (quoting *Atchison, Topeka, & Santa Fe Ry. Co. v. Ariz.*, 78 F.3d 438, 445 (CA9 1996) (Nielsen, J., dissenting)) (alteration in original). An argument based on Congressional silence might make sense if a structure were not already in place that protected the railroads by comparing them to commercial and industrial taxpayer. But nothing in the statute suggests that Congress, by virtue of the language it used in subsection (b)(4), was signaling that courts should use a different comparison class or, more to the point, that competitors would be that class.

In fact, the Eleventh Circuit's decision was so unmoored from the statute's text that the court left open the possibility of reading the word "discriminates" differently and thus using other comparison classes in other factual contexts. *See* Pet. App. 11a-12a n.3 & n.4. That reasoning finds its only support in "the dangerous principle that judges can give the same statutory text different meanings in different

cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005). And it is contrary to the courts' "obligation to maintain the consistent meaning of words in statutory text." *United States v. Santos*, 553 U.S. 507, 523 (2008) (plurality opinion). *See also Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 463-64 (1987) (maintaining consistent meaning in the 4-R Act). There is no firm textual basis to support a shifting comparison class that sometimes includes general and commercial taxpayers, and sometimes does not. And, as explained below, a rule that allows railroads to pick the comparison class poses serious predictability and administrability problems for governments and courts.

B. The statute's history and purpose establish that courts should compare the taxation of railroads to the taxation of local businesses.

We also know that the 4-R Act is concerned with comparing the taxation of rail carriers to the taxation of local businesses because that is what the railroads asked for. *See Transp. Act of 1972: Hearings on H.R. 11824, H.R. 11826, and H.R. 11207 Before the Subcomm. on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 356 (1972) (hereinafter 1972 Hearings) (statement of Stephen Ailes, President, Association of American Railroads). For their part, the railroads sought parity with local businesses because interstate carriers "are 'nonvoting, often nonresident, targets for local taxation.'" *W. Air Lines, Inc. v. Bd. of*

Equalization, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)).[8] By aligning their interests with local taxpayers, the railroads knew that they would be protected from paying an unfair share of taxes; "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

1. The railroads asked Congress to tie their fate to local businesses "and nothing more."

The railroads have no room to complain about section 11501's limited scope; the Association of American Railroads ("AAR") proposed section 11501. *See* S. Rep. No. 87-445, at 465-66 (1961) (hereinafter "Doyle Report"). When the AAR first pitched section 11501, it assured Congress that "[t]he proposal in no way alters the freedom of the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal tax treatment with other taxpayers." Doyle Report at 466. The proposal also made it clear that generally applicable taxes embod-

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[8] *See also* 1972 Hearings at 1244 (Rep. Brock Adams) ("The basic problem in the past has been these are out-of-State companies coming in, and it's easier to tax out-of-State companies because they are non-voters."); Brief for American Ass'n of Railroads as Amicus Curiae Supporting Petitioner at 8, *CSX Transp.*, 131 S. Ct. 1101 (No. 09-520) ("[T]his structural impulse [to discriminate against interstate carriers] is unchecked by any effective political counterweight, because the tax does not have to be paid by in-state voters").

ied the *goal* of section 11501: "[section 11501] has the obvious merit of insuring that such carriers would receive *equal treatment with other taxpayers subject to the same tax rates* in accordance with applicable State law." *Id.* (emphasis altered).

While the railroads' position has changed decades later, it remained constant throughout the 4-R Act's 15-year drafting process:

> I hope it is clear we are not here asking special tax favor from the States. We seek only the same treatment accorded other taxpayers—in other words, fairness, and nothing more.
>
> Our industry's just tax contributions have been an important cornerstone of State and local tax programs, and we expect to continue to pay our way and to contribute our fair share in assisting the States to meet their responsibilities to their residents.

1969 Hearings at 51 (statement of Thomas M. Goodfellow, President, AAR).

Congress echoed the railroads' assurances that section 11501 was only intended to tie interstate carriers to the general mass of taxpayers, not to grant favored status. *See, e.g.*, S. Rep. No. 90-1483, at 14 (1968) ("The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal tax treatment with other taxpayers."); S. Rep. No. 92-1085, at 7-8 (1972) ("[T]he measure *grants no favored status* to transportation property nor any windfall to carriers. It merely provides for equal treatment.") (emphasis added).

Simply put, taxes that treat railroads the same as local taxpayers give railroads everything they asked for, and all that Congress provided, in section 11501.

2. The railroads' competitors supported the 4-R Act in Congress.

The court of appeals held that Alabama's sales and use taxes are discriminatory because they fail to put CSX on equal footing with two of its competitors. The court of appeals' decision means that, when non-property taxes are involved, section 11501(b)(4) grants rail carriers most-favored-taxpayer status among interstate carriers because they are entitled to tax exemptions or benefits granted to other carriers. If this were true, no one would be more shocked than the railroads' competitors, who supported section 11501 every step of the way.

Congress has not enacted, and railroad competitors have not supported, legislation that would effectively give railroads most-favored-taxpayer status. Congress rejected the AAR's original proposal to "equalize competitive opportunities for our Nation's transportations carriers" by eliminating taxes paid by railroads and pipelines (who own their rights-of-way) but not their competitors (who used public rights-of-way). Doyle Report at 463-65. Congress brushed aside the AAR's re-introduction of the idea 14 years later. *See Railroads—1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1006, 1837 (1975) (hereinafter 1975 Senate Hearings) (statement of Stephen Ailes, President, AAR, asking for both section 11501 and exemptions from right-of-way taxes); *Railroad*

Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce, 94th Cong. 570 (1975)(hereinafter 1975 House Hearings) (same).

Instead, Congress adopted the AAR's proposal that protected "*all* common carriers engaged in interstate commerce" from discriminatory tax treatment. Doyle Report at 466 (emphasis added). Tellingly, representatives of the rail, motor, and water carriers sat side-by-side before Congress to support the bill, believing that "cooperative efforts among the modes could be of benefit to all types of carriers." 1972 Hearings at 347 (joint appearance by representatives of the AAR, the Water Transport Association ("WTA"), the American Trucking Associations ("ATA"), and America's Sound Transportation Review Organization). Although the ATA and WTA opposed parts of the 4-R Act, *see* 1975 Senate Hearings at 1165, 1473, the ATA openly supported section 11501 before the House and the Senate more than a year *after* subsection (b)(4) was added by the House. *See id.* at 1178 (Statement of Peter Beardsley, Vice President and General Counsel, ATA); 1975 House Hearings at 621 (same). The truckers thought the 4-R Act was a shield against local taxpayers, not a sword for the railroads to attack their competitors' tax preferences.

In light of this history, the 4-R Act cannot mean what CSX says it means. The most natural way for state and local governments to ensure parity between CSX and its interstate competitors would be to strip non-railroads of pre-existing exemptions and

refuse to grant them new ones. If the 4-R Act had required states to do that, the rail carriers' competitors would have argued against it, instead of for it, in the halls of Congress.

3. A comparison class of general commercial and industrial taxpayers is most consistent with the statute's purpose.

It is beyond reasonable dispute that limiting the comparison class to a railroad's competitors would undermine the purpose of the statute. Under that rubric, if a state imposed the same diesel fuel tax for motor carriers, rail carriers, and water barges, but did not impose that tax on diesel fuel used by any other businesses, there would be no discrimination. But that scheme would be a classic example of discrimination against interstate commerce. No one has ever suggested that Congress intended that result. And CSX has never argued that the courts should use a comparison class of railroad competitors in the many circumstances when that class would cut *against* railroads, rather than for them.

The purpose of the 4-R Act is also not served by a rule that allows the railroads to compare themselves to a class of "anyone," which might sometimes include general and commercial taxpayers and other times not. The problem addressed by the 4-R Act is a very common one: "the recognized danger that, to the extent that [a tax] burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal*

Mining Co., 309 U.S. 33, 45 n.2 (1940). The equally common solution to this problem is to impose the "political check" of "a significant group of state citizens who can be counted upon to use their votes [to] keep the State from raising the tax excessively." *Washington v. United States*, 460 U.S. 536, 545 (1983). A class of general commercial and industrial taxpayers thus provides the railroads with all the protection they need: the political safeguard of a "large group of local taxpayers [that] will have the political and economic power to protect itself against an unfair distribution of the tax burden." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (CA5 1987).

The court of appeals' contrary reasoning about the statute's purpose is unpersuasive. Noting that one of the Act's goals was "ensuring 'financial stability' for rail carriers," the court of appeals concluded that "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" this goal. Pet. App. 11a. But that analysis begs the question. A focus on the railroads' financial interest does not help to distinguish between those taxes that Congress wanted to eliminate and those it wanted to allow. It would help to "ensure the financial stability" of railroads if they could not be taxed at all. But that is obviously not what Congress intended.

Instead, Congress sought to balance the railroads' interest in minimizing taxes with the states' interest in making railroads pay their fair share. The goal was fairness and equality—to ensure that railroads, due to their "nonvoting, often nonresident" status, were not "'easy prey for State and local tax assessors.'" *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J.,

dissenting) (quoting *ACF Indus.*, 510 U.S. at 336). But, in solving the railroads' problem, Congress did not want to infringe on "the freedom of the State to tax its taxpayers as in its discretion it deems best." Doyle Report at 466.

Moreover, the lower court's rule would have the perverse effect of *increasing* barriers to interstate commerce by subjecting to judicial scrutiny targeted tax exemptions for interstate businesses. Alabama's water-carriers exemption is one such example. Alabama continues to tax the fuel purchased by all intrastate water carriers—in other words, Alabama is taxing its own citizens when they conduct business solely within the state. But Alabama is giving favorable tax treatment to the citizens of other states engaged in interstate commerce by water. This is precisely the kind of tax structure that the Congress that passed the 4-R Act would have approved because it promotes commerce between the states. But it is also the kind of exemption that would likely end if a state had to confer the benefit on all interstate carriers or none.

In other words, it is the comparison class of "other commercial and industrial" taxpayers that, adopting the Seventh Circuit's analogy to the Three Bears, keeps the porridge just right. *Koeller*, 653 F.3d at 509. As that court explained, "[e]xpanding the comparison class to include . . . commercial and industrial taxpayers helps both by creating a pool large enough for meaningful analysis and by providing a group that includes (as the statute contemplated) taxpayers with local political representation." *Id.* at 509-10. *See also Atchison*, 78 F.3d at 442; *McNama-*

ra, 817 F.2d at 375. That comparison class balances the interests of states and railroads by intruding no further on state authority than necessary to ensure that railroads are not targeted for discriminatory treatment.

C. A comparison class of general commercial and industrial taxpayers is the fairest and most workable standard.

As explained above, the lower courts have recognized essentially three approaches to the comparison class problem: (1) a comparison class composed of commercial and industrial taxpayers, which we support, (2) a class of railroad competitors, which the court of appeals used, or (3) a shifting comparison class of "anyone," which sometimes includes general commercial taxpayers and sometimes does not. *See supra* at 29-30, 35-37. A comparison class of general commercial and industrial taxpayers is the only option that does not present serious predictability and fairness problems.

1. Other approaches to the comparison class lead to unpredictable results.

If the Court adopts our proposed approach, state legislators will know—when they are considering a tax scheme or a particular exemption—whether the tax will be subject to judicial scrutiny under the 4-R Act. The question will be whether the tax on the railroads is also generally imposed on other commercial and industrial taxpayers in the state. Although there could be close cases, this is a question that a state or local policymaker can answer with relative ease in

most situations. Under the competitive and shifting class approaches, however, there is no way for a state policy maker to evaluate, when she is actually considering a tax proposal, whether that proposal will pass muster under the 4-R Act.

a. The consistent use of a competitor comparison class means that the impact of the 4-R Act will vary from jurisdiction to jurisdiction and over time. It will vary from jurisdiction to jurisdiction because the local market for transportation is different from county to county, city to city, and state to state. For example, CSX claims that Alabama's statewide tax exemption for interstate water carriers is discriminatory because trains compete with barges. J.A. 15-16, 18. But there are local jurisdictions in Alabama without barge traffic that collect sales and use taxes. Although CSX is suing these local jurisdictions, they would presumably be allowed to collect the tax based on the absence of interstate water carriers in their local transportation market. This same reasoning also holds true on a state-to-state level as well; states without much water traffic could presumably exempt that traffic from taxes, while states with substantial water traffic could not.

And the same uncertainty arises as the competitive landscape changes over time. For now, CSX concedes that railroads do not compete with airlines, so airline-related tax policies are not at issue in this litigation. *See* J.A. 16; Pet. App. 37a. But that could change in the future, which could mean that the enforceability of the state's tax code would change as well. Similarly, although CSX presently competes with interstate truckers, the marketplace could

change to eliminate direct competition—making a tax that was once subject to challenge under the 4-R Act into a tax that is not.

b. The shifting class approach creates even greater uncertainty for state and local governments (and railroads). That doctrine provides no *ex ante* guidance to state policy makers because it turns entirely on how a railroad frames its specific challenge. How must state tax law equalize exemptions between railroads and other taxpayers to avoid a 4-R challenge? If a state wants to subsidize a pipeline project, will that affect the taxes that railroads pay? What about Fed Ex, UPS, and the United States Postal Service? Under a shifting class approach, there is no way to answer these questions short of litigation after a tax exemption is already enacted. A tax's legality under federal law should not unpredictably depend on how a railroad frames its argument.

2. Other approaches to the comparison class are unfair to non-railroad taxpayers.

The competitor and shifting class approaches are also unfair to other taxpayers. A "narrow comparison class" comprised only of railroad competitors "result[s] in preferential treatment for the railroads" as compared to the average taxpayer. *Atchison*, 78 F.3d at 442. Similarly, where a railroad can choose its own comparison class, it becomes a *de facto* most favored taxpayer. This is because "if every person and business . . . paid a $1 annual tax, and *one person* was exempt, [the railroad] could sue under subsection (b)(4) and require the State to either exempt [it]"

or to provide an adequate reason for the classification. *CSX Transp.*, 131 S. Ct. at 1119 (Thomas, J., dissenting). The Court did not consider this problem to be serious enough to prevent railroads from challenging exemptions at all. *Id.* at 1109 n.8. But it is nonetheless a compelling reason to limit the railroads' ability to hand-pick the comparison class.

Both this Court and the lower courts have rightly rejected the notion that the 4-R Act should provide "a 'windfall' to railroads." *CSX Transp.*, 131 S. Ct. at 1109 n.8; *see also Koeller*, 653 F.3d at 508-10. But a windfall is exactly what a competitor comparison class has produced in the lower courts. Courts that have adopted our proposed approach have ruled at times in *favor* of the railroads and at times *against* them, but *every* appellate court that has reduced the comparison class to a small number of competitors has ruled only in favor of the railroads.[9] This latter result goes well beyond "merely provid[ing] for [the] equal treatment" of railroads, S. Rep. No. 92-1085, at 7-8 (1972), and instead would "have the practical effect of prohibiting virtually any taxation of railroads," *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1304 (CA8 1991) (Floyd, J., dissenting).

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[9] *Compare, e.g., Koeller*, 653 F.3d 496; (adopting general class comparison and ruling in *favor* of railroads); *McNamara*, 817 F.2d 368 (same); *Atchison*, 78 F.3d 438 (adopting general class comparison and ruling *against* railroads) *with* Pet. App. 1a-17a (using competitive comparison class and ruling in *favor* of railroads); *Union Pac. R.R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693 (CA8 2007) (same); *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984 (CA8 1999) (same); *Burlington N. R.R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993) (same).

To be sure, Congress sought to use the 4-R Act to "restor[e] the financial stability of railroads," *CSX Transp.*, 131 S. Ct. at 1109, and to "foster competition among all carriers," Railroad Revitalization and Regulatory Reform Act of 1976, 94th Cong., 90 Stat. 31, 33 (1976) (codified at 45 U.S.C. § 801(b)(2)). But Congress also sought to "balance the needs of carriers, shippers, and the public." *Id.* Only our approach to the comparison class solves the problem in a fair way that affords the railroads the protection of being grouped with politically powerful local taxpayers without granting them most-favored-taxpayer status.

3. Tennessee provides a real-world example of unfairness and unpredictability.

Tennessee's legislative response to its 4-R Act litigation provides a real-world example of the predictability problems inherent in the competitor and shifting class approaches. For many years, Tennessee exempted purchasers of on-road diesel from paying a sales and use tax, but not purchasers of off-road diesel. *See Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, 969 F.Supp.2d 892, 894 (M.D. Tenn. 2013). This meant that, before 2014, railroads and water carriers both paid the sales tax, and truckers paid a state motor fuels tax. *Id.*

After years of litigation in which the railroads argued that they were being discriminated against because they were not treated like truckers, the Tennessee Legislature caved to the railroads' demands. It changed the law to tax off-road diesel used by railroads exactly the same as on-road diesel used by truckers. *See* Transportation Fuel Equity Act of

2014, 2014 Tennessee Pub. Acts, Ch. 908. But the railroads did not respond with their thanks. Instead, they sued on the grounds that they were now being discriminated against because they were not being treated the same as *the water carriers*, which is how they were treated under the old tax code.[10]

Now, consider what would happen if Tennessee acted *again* to moot the railroads' claim by imposing the same on-road diesel excise tax on the water carriers. The railroads and the water carriers would be the *only* taxpayers subject to the excise tax for off-road diesel—all other taxpayers would pay the sales and use tax. Under the shifting class approach, the railroads could then sue on the grounds that they are paying a tax on off-road diesel that the general class of commercial and industrial taxpayers does not pay. In short, the competitor and shifting class approaches mean that the railroads can always sue, and likely win, under the 4-R Act. It is a heads-I-win, tales-you-lose proposition.

* * *

As the railroads aptly stated in *ACF Industries*, "[s]ection [11501] protects railroads from excessive and unfair state taxation *by tying their fate to that of local taxpayers*." Brief of AAR as Amicus Curiae Supporting Respondents at 26, *ACF Indus.*, 510 U.S.

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[10] *See CSX Transp., Inc. v. Tenn. Dep't of Revenue*, No. 3:14-cv-01400 (M.D. Tenn.), *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, No. 3:14-cv-01401 (M.D. Tenn.), and *Norfolk Southern Ry Co. v. Tenn. Dep't of Revenue*, No. 3:14-cv-01472 (M.D. Tenn.); *BNSF Ry. Co. v. Tenn. Dep't of Revenue*, No. 3:14-cv-01399 (M.D. Tenn.).

332 (No. 92-74) (emphasis added). The court of appeals' conclusion that section 11501 is instead concerned with granting rail carriers the same tax benefits given to their interstate competitors, without consideration of general commercial and industrial taxpayers, is irreconcilable with the 4-R Act's text, history, and purpose. The only taxes that are subject to judicial scrutiny under subsection (b)(4) are taxes that are unfair to railroads as compared with the general class of industrial or commercial taxpayers.

II. Alabama should be able to offer justifications for treating railroads differently, which may include complementary taxes.

If the Court adopts Justice Thomas and Justice Ginsburg's answer to the first question, then the second question presented is beside the point. CSX has never argued that Alabama's tax system treats the railroads worse than the general mass of commercial and industrial taxpayers who must pay sales and use tax. Nonetheless, the court of appeals also erred in refusing to evaluate the state's justifications for treating CSX differently than other taxpayers. *See* Pet. App. 16a (finding the case to be "simple[]" because "[r]ail carriers pay the State sales tax—motor and water carriers do not"). The court of appeals' decision on this front was contrary to this Court's decision in *CSX Transportation* and the way discrimination is evaluated in every comparable context. Dissimilar treatment alone is not discrimination.

The court of appeals' rule also greatly exacerbates the predictability and fairness problems inher-

ent in the competitor-class and shifting-class approaches. If the 4-R Act allows the railroads to compare themselves to a hand-picked class of other taxpayers, then the state must be allowed to justify that different treatment under a relatively deferential rational-basis test. Otherwise, railroads will be eligible for every exemption in the code.

A. Discrimination in comparable contexts requires more than dissimilar treatment.

In *CSX Transportation*, the Court explained that mere dissimilar treatment does not equal "discrimination." Instead, discrimination requires dissimilar treatment *without justification*. The Court adopted this understanding of "discrimination" at least three times. *See* 131 S. Ct. at 1108 ("when no reasonable distinction can be found between those favored and those not favored"), *id.* ("if the groups are the same in all relevant respects"), *id.* at 1109 (if "the groups are similarly situated and there is no justification for the difference in treatment"). The Court anticipated that a lawsuit about a tax exemption "having nothing to do with railroads" would be "promptly dismissed." *Id.* at 1109 n.8. The Court held that a railroad can "prove the alleged discrimination" only if the state does not "offer[] a sufficient justification for declining to provide the exemption at issue to rail carriers." *Id.*

This manner of determining discrimination—a prima facie case of dissimilar treatment between two groups followed by an evaluation of the defendant's justifications—is the way discrimination is evaluated in comparable contexts. *See generally* Samuel

Eckman, *Note, A State-Centered Approach to Tax Discrimination Under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051 (2012). Three of those contexts are similar to what the Court had in mind in *CSX Transportation*, and all provide for a tax-to-tax comparison.

1. Equal Protection Clause

A state violates the Equal Protection Clause by taxing similarly-situated persons differently without a sufficient justification. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). With respect to commercial classifications, the rational basis test applies: a sufficient justification is any "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)). This anti-discrimination principle "is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11 (citations omitted). Importantly, the rational basis test can be satisfied based on "the fairness and reasonableness" of a "complementary" tax. *General Am. Tank Car Corp. v. Day*, 270 U.S. 367, 373 (1926).[11]

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[11] The Court later modified the holding in *General American* "[t]o the extent that *General American*'s Equal Protection

2. Dormant Commerce Clause

The dormant commerce clause also protects against tax-related discrimination. Two doctrines in the dormant commerce clause area have special salience here: *Complete Auto Transit* and complementary taxation.

a. The *Complete Auto Transit* test protects interstate enterprises from overtaxation by requiring the state to identify a "reasonable" basis for imposing the tax. Under *Complete Auto Transit*, a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This test recognizes that "a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Revenue Dep't of State of Wash. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 748 (1978). To guard against overtaxation, the Court merely requires that "the measure of a tax [be] *reasonably related* to the taxpayer's activities or presence in the State—from which it derives some benefit," even if "the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618, 628 (1981) (emphasis added).

Clause discussion ever could have been read as suggesting appropriate Commerce Clause analysis." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 652 (1994).

b. Another dormant commerce clause doctrine, the complementary or compensatory tax doctrine, specifically allows a state to justify a facially discriminatory tax imposed on *inter*state commerce by reference to an offsetting tax. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 102 (1994). The doctrine applies to "a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce." *Id.* at 102-03. But there is no "iron rule of equality" for "taxes laid by a State on different types of business." *Alaska v. Arctic Maid*, 366 U.S. 199, 205 (1961) (taxes on intrastate and interstate competitors "not so palpably disproportionate as to run afoul of commerce clause").

3. The Supremacy Clause

The Supremacy Clause prohibits the states from imposing direct taxes on the federal government and from discriminating against those who conduct business with the federal government. *See United States v. County of Fresno*, 429 U.S. 452, 457-464 (1977). But, in a series of cases, this Court has held that the states can impose special taxes on persons who do business with the federal government to compensate for generally applicable taxes that the federal government itself is not obliged to pay. *See Washington v. United States*, 460 U.S. 536, 546 (1983) (special tax on federal contractors justified because generally applicable tax could not be imposed on federal government itself); *United States v. City of Detroit*, 355 U.S. 466, 473-474 (1958) (special tax on users of tax-except property justified as compensation for proper-

ty taxes that the federal government does not pay). The Court explained that the "important consideration" is "whether the tax is discriminatory with regard to the economic burdens that result." *Washington*, 460 U.S. at 544. A state thus does not "discriminate against the Federal Government and those with whom it deals" if it does not "treat[] someone else better than it treats them." *Id.*

* * *

Of these doctrines, the rational basis test has the most intuitive appeal for incorporation into the 4-R Act. Subsection (b)(4) would prevent governments from discriminating against railroads by requiring the government to identify a justification "having nothing to do with railroads." *CSX Transp.*, 131 S. Ct. at 1109 n.8. Subsection (b)(4) would also meaningfully benefit the railroads by giving them access to a federal forum for injunctive and declaratory relief, which they generally lack for tax-related constitutional claims. *See* 28 U.S.C. § 1341; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-302 (1943).

On the other side of the ledger, the rational basis test would allow governments the discretion they need to structure their tax systems in a fair way. Under a rational basis test, most lawsuits about tax exemptions would be "promptly dismissed" as the Court envisioned. *CSX Transp.*, 131 S.Ct at 1109 n.8. Because there are many rational reasons for treating railroads differently than other taxpayers, railroads would not become most-favored taxpayers able to take advantage of every exemption in the code. *See* Transcript of Oral Argument at 44, *CSX*

Transp., 131 S. Ct. 1101 (No. 09-520) (Justice Sotomayor: "But if there is a—some form of legitimate reason to treat people differently, I think [CSX] is saying that's okay.").

The other doctrines discussed above also teach valuable lessons. If a state can ensure that interstate commerce "pays its way" generally, then it makes sense that a state has the same interest with respect to railroads specifically. Likewise, if a complementary tax is a sufficient justification for differentiating between interstate and intrastate taxpayers or between federal and non-federal contractors, it makes sense that imposing a "roughly equivalent" tax on "substantially similar" events would be a sufficient justification for different treatment as between railroads and their competitors. *See* Transcript of Oral Argument at 48, *CSX Transp.*, 131 S. Ct. 1101 (No. 09-520) (Chief Justice Roberts: "Couldn't you, if we rule against you, when you get back and other State officials say, look, the one thing we don't have to worry about is being precise.").

But the most important insight, for present purposes, is that the inquiry into discrimination does not stop at dissimilar treatment. To determine whether a defendant is "discriminating," a court must weigh the defendant's justification for treating persons differently. The court of appeals' decision is thus contrary to the way this Court evaluates discrimination in *any* comparable area of the law.

B. The courts must evaluate a state's justification for dissimilar treatment regardless of how knotty the question is.

The court of appeals gave a single, and unpersuasive, reason for refusing to consider the state's justifications for treating the railroads differently: *it is just too hard*. *See* Pet. App. 13a. That reason is in tension with this Court's decision in *CSX Transportation* and finds no purchase in other anti-discrimination or tax-related decisions. *See CSX Transp.*, 131 S. Ct. at 1114. It is also inconsistent with CSX's cause of action, which expressly requests that a court compare the taxation of CSX's fuel to that of its competitors. *See* J.A. 18. Having asked the courts to engage in a comparison between competitors' fuel taxes, CSX cannot also argue that the courts are not up to the task.

1. This Court in *CSX Transportation* contemplated that the federal courts would be called on to resolve knotty and difficult questions about dissimilar treatment.

When this case was first before the Court, we argued that allowing CSX's challenge would "saddle the lower courts with a host of new questions" because "Congress provided no standard for distinguishing between valid and invalid exemption schemes." Brief for the Respondents at 35, *CSX Transp.*, 131 S. Ct. 1101 (No. 09-520). In particular, we warned that courts would need to "look to other parts of the State's tax code to notice complementary taxes paid by the comparison class." *Id.* at 36. We suggested that the Court avoid these difficult issues

by rejecting CSX's challenge at the preliminary stage.

The Court arrived at a different answer. But, in allowing CSX's suit, the Court recognized that the lower courts would have a difficult task on remand. It noted that we had argued "in support of barring CSX's challenge at the outset, that this inquiry into discrimination may pose difficulties." *CSX Transp.*, 131 S. Ct. at 1114. The Court agreed that "[d]iscrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified." *Id.* Specifically, these "difficult issues can emerge when, as here, States provide certain entities with tax exemptions." *Id.* Nonetheless, the Court directed the lower courts on remand "to review a railroad's challenge" instead of "declar[ing] the matter beyond" judicial competence. *Id.*

The court of appeals' reasons for not evaluating our complementary tax argument cannot be reconciled with this history. The court of appeals might be right that courts cannot easily evaluate competing claims about complementary taxation. But that is the path this Court's *CSX Transportation* decision put us on, and the Court expressly recognized that the path would not be an easy one.

This is not to say that a court must account for "every oscillation in diesel fuel's market value" or whether the "dynamic nature of any state's economy will alter the relative benefits and burdens of its tax system from moment to moment." Pet. App. 15a. The law contemplates that the state will *justify* different treatment, not *eliminate* it. A complementary tax "is

merely a specific way of justifying" dissimilar tax treatment. *Oregon Waste*, 511 U.S. at 102. There is no good reason for the courts to refuse to evaluate a complementary-tax justification just as they would any other justification.

2. The court of appeals' decision is not supported by comparable case law.

The court of appeals' decision not to evaluate the state's complementary tax argument finds little support in the case law. Here, our asserted justification is not that "the state's tax structure, *as a whole*, treat[s] railroads similarly to every other commercial and industrial taxpayer." Pet. App. 24a. It is instead that the state's decision to exempt on-road fuel from the sales and use tax is justified because that fuel carries a separate, and generally higher, motor fuels tax. As we have shown above, the courts are often called upon to make these complementary tax-to-tax comparisons. *See supra* at 46-49; *see also* Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Law. 405 (1986) (recounting areas in which the courts evaluate complementary taxes).

The court of appeals erroneously relied on decisions from the Fifth and Eighth Circuits to support its cramped inquiry into Alabama's justifications. But the dissenting judge and district judge convincingly explained why those cases are not persuasive. *See* Pet. App. 48a-51a, 22a-25a. First, they preceded this Court's decision in *CSX Transportation* instructing the lower courts to review a state's justifications for different treatment. *See* Pet. App. 24a. Second,

that line of authority began with a case in which "the court considered a different kind of tax—a specific tax that 'targeted' railroads for differential treatment, rather than a general tax that exempted railroads' competitors." Pet. App. 23a. The question there was the abstract fairness of singling out a railroad for a tax that no one else had to pay; the question here is one of complementary taxation on the same item when used by a railroad and its competitors.[12]

For the same reason, the court of appeals erred in relying on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). Pet. App. 16a. There, the Court held unconstitutional under the First Amendment an "ink and paper tax" that "single[d] out the press." *Id.* at 591. *See also id.* at 583 n.5 ("everything is exempt from the use tax on ink and paper, except the press"). When the government attempted to justify the tax by arguing that the overall tax burden on the press was fair in light of the tax burden borne by other businesses, the Court declined to evaluate the abstract fairness of the tax. In so doing, the Court invoked precisely the same distinction that the dissenting

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[12] There is an argument that the courts should also compare offsetting tax burdens in "targeting" cases. *See Burlington N. R.R. Co. v. City of Superior*, 932 F.2d 1185, 1188 (CA7 1991) (Flaum, J., dissenting); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1304 (CA8 1991) (Gibson, J., dissenting). In fact, in a different 4-R Act case, CSX itself asked for, and the Court engaged in, this kind of admittedly complex inquiry. *See CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 19 (2007). The Court need not answer this question here.

judge and district judge in this case relied on: that the government had singled out the press for a special tax instead of "taxing the press in the same manner that it taxes other enterprises" and "requiring the press to bear its share of the burden" in that way. *Id.* at 589 n.12.[13]

To be sure, the Court's case law recognizes that it is often a difficult task to evaluate "the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation." *Commonwealth Edison*, 453 U.S. at 628. *But see Fulton Corp. v. Faulkner*, 516 U.S. 325, 336 (1996) (declining to hold "that a State may never justify a compensatory tax by an intrastate burden included in a general form of taxation"). But that is not what we are asking the Court to do. Instead, our complementary tax justification requires the Court to compare roughly equivalent taxes imposed on the same taxable event—the purchase of diesel fuel—which is an analysis the courts regularly perform.

3. In any event, the complementary tax question is not difficult to answer in this case.

Finally, a key fact greatly simplifies the comparison between railroads and truckers in this case: nothing prohibits the railroads from buying clear

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[13] The Court also cited the "delicate and cherished First Amendment rights" at issue in that litigation and the concern that "even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects." 460 U.S. at 588, 589 n.12.

diesel and paying the same excise tax the truckers pay. Any fuel upon which the motor fuels tax is paid "shall not be subject to any other excise tax levied" by the State of Alabama. Ala. Code § 40-17-325(b). For the purposes of this case, it does not matter whether an offsetting tax must be "roughly equivalent," exactly the same, or something else. Unlike the truckers who are stuck with the motor fuels tax as a matter of federal and state law, the railroads can choose to operate their engines with either clear diesel fuel or dyed diesel fuel. This means that under no circumstances will railroads pay more state tax than the truckers except by their own choice. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937) (no discrimination when "one [person] pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed").

C. Compared to its competitors, CSX did not prove discrimination.

The district court was correct to hold that CSX failed to carry its burden to establish discrimination, even as compared to its class of hand-picked competitors. CSX has never alleged that Alabama has targeted railroads. And Alabama has justifications for extending tax exemptions to truckers and interstate water carriers that have "nothing to do with railroads." *CSX Transp.*, 131 S. Ct. at 1109 n.8. For its part, CSX did not meaningfully rebut those justifications or otherwise show that it was disadvantaged because of the dissimilar treatment.

1. There is a sufficient justification for the on-road diesel fuel tax exemption.

Alabama's interest in avoiding double taxation of clear diesel fuel sufficiently justifies exempting that fuel from the sales and use tax, even while applying the tax to dyed diesel. *See Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 284 (1932) ("a rational basis for the distinction made[] is the fact that the state has adopted generally a policy of avoiding double taxation"). For historical reasons related to federal highway funding, on-road fuel carries a separate, and generally higher, excise tax. No one who pays the motor fuels tax is subject to the sales and use tax, including the railroads when they purchase clear diesel to operate their own vehicles. As the district court put it, the truckers are exempt "*because* they pay a comparable excise tax on this fuel, a tax not imposed on rail carriers." Pet. App. 57a.

2. There is a sufficient justification for the interstate water carriers' exemption and CSX is not disadvantaged by the exemption in any event.

The district court gave two persuasive reasons for denying CSX's claim as it related to the state's exemption for interstate water carriers.

a. First, water carriers and railroads are not similarly situated because there are dormant commerce clause concerns with taxing interstate water carriers that do not exist with respect to railroads. *See Packer Corp. v. State of Utah*, 285 U.S. 105, 110 (1932) ("[i]t

is a reasonable ground of classification that the state has power to legislate with respect to persons in certain situations and not with respect to those in a different one"). Interstate water carriers operate in interior waterways that are maintained by the Army Corps of Engineers, regulated by extensive federal laws, and under the historical control of the federal government. *See supra* at 8-10. They may travel through Alabama without even making landfall, much less accessing "services provided by the State." *Complete Auto Transit*, 430 U.S. at 279.

Moreover, prohibitions on taxing commerce on navigable waterways have existed since the founding of this country. This Court has equated the "right to use the navigable waters of the United States" with the right to petition the government and the writ of habeas corpus. *Slaughter-House Cases*, 83 U.S. 36, 79-80 (1872). And it has acknowledged that "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *United States v. Locke*, 529 U.S. 89, 99 (2000); *see also Ex parte Boyer*, 109 U.S. 629, 632 (1884) ("navigable water" is "public water of the United States").

As explained above, one such historical prohibition against taxation on navigable waterways is found in the Congressional Act admitting Alabama to the Union. *See supra* at 9. It is uncertain how broad

this prohibition is.[14] But whatever its scope, no such deeply rooted historical protection exists in favor of railroads. Railroads and water carriers are not similarly situated.

b. Furthermore, the district court was right that no evidence in the record establishes any anti-competitive effect from the interstate water carriers' exemption. *See Amer. Trucking Ass'ns, Inc. v. Mich. Publ. Serv. Comm'n*, 545 U.S. 429, 436 (2005) (plaintiff mush establish "burdensome or discriminatory impact" and "the unfairness of the assessment"). The stipulated facts at trial showed, if anything, that water carriers move exceedingly little freight in Alabama as compared to railroads and truckers. *See* J.A. 29-30 ("82% of freight moved intrastate within Alabama was transported by trucks, 6% by rail, and 1% of freight moved intrastate within Alabama was transported by water."). And there is no evidence about how much benefit interstate water carriers derive from the tax exemption because there is no evidence about how much diesel fuel would be subject to tax if the exemption were taken away. If a railroad claims that the state is discriminating against it by favoring its competitors, the railroad should show that it would benefit if the purported favoritism stopped. CSX never did.

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[14] *See Pollard v. Hagan*, 44 U.S. 212, 229 (1845) (holding that the prohibition in Alabama's enabling act is a constitutional "regulation of commerce among the several states"); *Huse v. Glover*, 119 U.S. 543, 548 (1886) (holding that, despite a similar prohibition, a "state may exact reasonable tolls" to compensate "for the use of artificial facilities constructed" such as locks).

CONCLUSION

The Court should reverse the court of appeals.

Respectfully submitted,

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September 9, 2014

APPENDIX

49 U.S.C. §11501 ..... 1a

Former 49 U.S.C. §13(4) 4a

Excerpts from Original 4-R Act 6a

49 U.S.C. § 11501

Tax discrimination against rail transportation property

(a) In this section--

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section--

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the

assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Former 49 U.S.C. § 13(4)[1]

Duty of Commission where State regulations result in discrimination.

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided,* That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give

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[1] The statute is reproduced as it was set out in *Public Service Commission v. United States*, 365 F. Supp. 6, 8-9 (S.D. W. Va. 1973) (three-judge court) (per curiam).

special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

"Railroad Revitalization and Regulatory Reform Act of 1976," Public Law 94–210, S. 2718, (February 5, 1976)

TITLE I—GENERAL PROVISIONS

DECLARATION OF POLICY

Sec. 101. (a) Purpose.—It is the purpose of the Congress in this Act // 45 USC 801. // to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through—,

(1) ratemaking and regulatory reform;

(2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;

(3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;

(4) transitional continuation of service on light-density rail lines that are necessary to continued

employment and community well–being throughout the United States;

(5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and

(6) necessary studies.

(b) Policy.—It is declared to be the policy of the Congress in this Act to—,

(1) balance the needs of carriers, shippers, and the public;

(2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises;

(3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets;

(4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;

(5) promote seperate pricing of distinct rail and rail-related services;

(6) formulate standards and guidelines for determining adequate revenue levels for railroads; and

(7) modernize and clarify the functions of railroad rate bureaus.

* * *

TITLE III— REFORM OF THE INTERSTATE COMMERCE COMMISSION

* * *

PROHIBITING DISCRIMINATORY TAX TREATMENT OF TRANSPORTATION PROPERTY

Sec. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

"Sec. 28. (1) Notwithstanding the provisions of section 202 (b), // 49 USC 26c. // any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

"(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio whcih the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

"(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

"(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

"(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

"(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—,

"(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

"(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

"(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

"(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

"(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of

all such other commercial and industrial property cannot be established through the random–sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

"(3) As used in this section, the term—,

"(a) 'assessment' means valuation for purposes of a property tax levied by any taxing district;

"(b) 'assessment jurisdiction' means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

"(c) 'commercial and industrial property' or 'all other commercial and industrial property' means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or

industrial use and which is subject to a property tax levy; and

"(d) 'transportation property' means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.".

RESPONDENT'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

Whether the court of appeals correctly held that Alabama's sales and use tax on fuel that requires rail carriers to pay the tax, but completely exempts motor and interstate water carriers who compete against the rail carriers, constitutes a type of discrimination that violates 49 U.S.C. § 11501(b)(4).

And as specified by the Court:

Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

RULE 29.6 STATEMENT

CSX Corporation is the parent company of respondent. No other publicly held corporation has a 10% or greater ownership interest in respondent.

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INTRODUCTION

This case presents the issue that this Court left open in *CSX Transportation, Inc.* v. *Alabama Department of Revenue,* 131 S. Ct. 1101, 1107 n.5 (2011) ("*CSXT I*"): whether Alabama's sales and use tax on diesel fuel, which applies to railroads but exempts motor carriers and interstate water carriers, "actually discriminate[s]" against railroads in violation of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"). The Eleventh Circuit correctly held that the exemptions for motor carriers and water carriers are both discriminatory. By operation of these exemptions, Alabama requires railroads, but not their direct competitors, to pay a substantial sales tax on their purchase of fuel. This differential tax treatment imposes a significant competitive disadvantage on railroads because fuel costs are one of the major operating expenses of interstate carriers. In addition, Alabama is imposing an additional tax burden on railroads to contribute to its general revenue fund that its competitors do not bear. As the court of appeals properly recognized, Congress found that such extra tax burdens on railroads threaten their financial stability and are precisely the sort of state tax predation that the 4-R Act was designed to prevent.

In reaching this conclusion, the court of appeals correctly found that discrimination against railroads as compared to their competitors is a form of discrimination that violates the sweeping protection against discriminatory taxes embodied in the 4-R Act. This conclusion follows from the text, structure, purpose, and history of the statute, and reflects the considered judgment of the United States. More

importantly, recognizing such claims is essential for the 4-R Act to fulfill its vital purpose of ensuring the economic survival of railroads, which can only be achieved if railroads compete on a level playing field with other carriers. An affirmance of the Eleventh Circuit on this issue resolves this case. Alabama's interstate water carriers, who pay no tax on their diesel fuel, are plainly the beneficiaries of a discriminatory tax regime. This naked preference, by itself, requires invalidation of Alabama's tax on the railroads.

The Court also asked the parties to address the courts of appeals' decision not to consider Alabama's imposition of a separate tax on motor carriers, which was the State's attempt to provide a justification for its differential tax treatment of the railroads and the motor carriers. Although the Court need not reach this issue because the tax on the railroads is unlawful based on the water carrier exemption, the Eleventh Circuit properly rejected Alabama's proffered justification for the motor carrier exemption.

Nothing in the statute permits the consideration of other taxes. Alabama points to this Court's recognition of a complementary tax defense under the dormant Commerce Clause and other constitutional provisions, but those constitutional doctrines are inapplicable here, where there is a controlling federal statute. Even if the standards developed under the complementary tax doctrine were relevant here, however, the motor carrier tax fails to qualify as a complementary tax that can justify Alabama's discriminatory scheme. The motor carrier tax is not a proxy or substitute for the sales tax: the incidence of the two taxes is different, they are not economically equivalent, and they are not designed to make interstate carriers share a common tax burden.

Alabama therefore cannot justify its failure to provide the same sales tax exemption to railroads that it provides to motor carriers. Thus, the judgment should be affirmed.

STATEMENT OF THE CASE

A. Statutory Background

Rail carriers were subject to blatantly discriminatory state and local taxation for decades prior to the 4-R Act's enactment in 1976. Congress first surveyed the nature and impact of the discrimination in 1961, see Special Study Group on Transp. Policies in the U.S., Sen. Comm. on Commerce, Nat'l Transp. Policy, S. Rep. No. 87-445, at 449-66 (1961) (the "Doyle Report"), and later found that rail carriers were "'easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. No. 91-630, at 3 (1969)). Congress quantified the impact of the discrimination to be "at least $50 million each year," at a time when that amount could be the difference between survival and extinction for the rail freight industry. H.R. Rep. No. 94-725, at 78 (1975); see also S. Rep. No. 91-630, at 1 (noting "long-standing burden on interstate commerce" created by discriminatory state taxation of railroads).

Congress also found that unequal tax burdens on different modes of transportation were one form of government-created imbalance that hampered railroads from competing successfully with other transportation carriers. See, *e.g.*, Doyle Report at 449 (noting Congress's concern with the "relative tax burdens on truck, air, bus, pipeline, water, and

railroad carriers"). In particular, Congress recognized that there was an inherent disparity because motor carriers principally were assessed user charges that paid for their highways, while railroads were assessed property and other taxes that went into state coffers, and yet railroads still had to pay for their track and other infrastructure on their own. *Id.* at 449-50.

In the face of numerous railroad bankruptcies, Congress enacted extraordinary, protective legislation as part of the 4-R Act. The 4-R Act's purpose is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Pub. L. No. 94-210, § 101(a), 90 Stat. at 33. Congress also sought to remove various forms of government-created imbalances that had hampered railroads in order to "foster competition among all carriers by railroad and other modes of transportation," 45 U.S.C. § 801(b)(2), in particular by banning discriminatory state and local taxation of railroads.

Section 306 of the 4-R Act, now codified at 49 U.S.C. § 11501, broadly prohibits states and their subdivisions from engaging in such tax discrimination, setting forth four forbidden taxing schemes deemed to "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). The first three schemes specifically concern discriminatory property taxes. Subsection (b)(4) prohibited the states from "[i]mpos[ing] another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board

under this part." *Id.* § 11501(b)(4).[1] That provision came into being when Congress "realized near the end [of the legislative process] that banning discriminatory property taxes was not enough to save the railroads from unfair state taxation," and "added [subsection (b)(4)] to ensure that the statute would not fail of its broader purpose." *Kan. City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987). Subsection (b)(4) has been described as "a catch-all designed to prevent the state from accomplishing the forbidden end of discriminating against railroads by substituting another type of tax." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

B. Proceedings Below

1. Respondent CSX Transportation, Inc. ("CSXT") is a common carrier railroad engaged in interstate commerce. Pet. App. 2a. CSXT operates in Alabama, and is subject to taxation by Alabama and its subdivisions. *Id.*

Alabama imposes a general sales tax on the gross receipts of retail businesses, Ala. Code § 40-23-26(c), and a use tax on the storage or use of, or other

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[1] As enacted in 1976, section 306 prohibited the "imposition of *any other tax* which results in discriminatory treatment of a common carrier by railroad"; the amended text (also recodified) prohibits "*another tax* that discriminates against" a railroad. *Compare* Pub. L. No. 94-210, § 306(1)(d), 90 Stat. at 54, *with* Pub. L. No. 95-473, § 11503(b)(4), 92 Stat. 1337, 1446 (1978) (emphases added). The amendment "may not be construed as making a substantive change." Pub. L. No. 95-473, § 3(a), 92 Stat. at 1466; *see CSXT I*, 131 S. Ct. at 1105 n.1. Congress later recodified § 306 as Section 11501. CSXT will refer to the current codification, although it will note the original language of section 11501(b)(4) as an aid in construction. *See* Sup. Ct. R. 34.5.

exercise of dominion or control over, tangible personal property, *id.* § 40-23-60. The state sales and use tax, levied at a four percent rate, applies to the railroads' purchase and use of diesel fuel in Alabama. Pet. App. 2a.[2] Revenues from the State's sales and use tax are deposited in its general revenue fund. *Id.* at 4a (citing Ala. Code § 40-23-35). Alabama law also permits counties and municipalities to impose additional sales and use taxes, which correspond to and parallel the sales and use tax imposed by the State itself. *Id.* at 35a-36a. The imposition of these county and municipal sales and use taxes results in CSXT paying in many areas much more than the four percent state tax. *Id.* at 36a (listing additional city sales and use tax rates of up to four percent imposed on CSXT's purchase and use of diesel fuel, and county tax rates of up to 2.5 percent). The railroads' principal competitors in Alabama, motor carriers and interstate water carriers,[3] are exempt from state and local sales and use taxes on their purchase and use of diesel fuel. *Id.* at 2a-3a.

Fuel used by motor carriers is subject to a distinct and fixed state motor fuel excise tax of 19 cents per gallon that only applies to fuel used on the highways. Ala. Code §§ 40-17-2(1), -220(e). Under Alabama law,

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[2] Alabama's sales and use tax also applies to CSXT's purchase of numerous other goods and services. *See* Attachment 11 to Friedman Aff. (Doc. No. 64-13) (from 2007 to 2010, CSXT paid more than $10 million in Alabama sales and use tax on track and signal material). CSXT only challenges Alabama's imposition of its sales and use tax on CSXT's diesel fuel purchases.

[3] The parties stipulated below that the railroads' principal competitors "in the transportation of property in interstate commerce in the State of Alabama" are motor carriers and interstate water carriers. JA 28 ¶ 10.

the proceeds from the motor fuel excise tax must be devoted to the construction, repair, and maintenance of public roads and bridges; to the costs of tax collection; and to pay the principal and interest on bonds previously issued to finance the building of roads. *Id.* §§ 40-17-13, -146, -222. Because motor carriers are subject to the excise tax and not to the sales and use tax, their tax burden does not fluctuate with the price of fuel.

Water carriers do not pay any state tax on fuel used by vessels engaged in interstate or foreign commerce. They are exempt from the state sales and use tax on diesel fuel, *id.* §§ 40-23-4(a)(10), -62(12), and are not subject to the motor fuel excise tax. Accordingly, "[interstate] water carriers pay no tax whatsoever on their diesel fuel purchases." Pet. App. 3a.

2. On April 14, 2008, CSXT filed this action in federal district court against Alabama. The complaint alleged that the 4-R Act prohibits Alabama, and counties and municipalities within Alabama, from imposing sales and use taxes on CSXT's purchase and use of diesel fuel because the exemptions granted to motor carriers and interstate water carriers discriminate against CSXT within the meaning of subsection (b)(4).

a. The district court initially dismissed CSXT's complaint, based on Eleventh Circuit precedent holding that an exemption to a generally applicable non-property tax may not be challenged under subsection (b)(4). See *Norfolk S. Ry.* v. *Ala. Dep't of Revenue*, 550 F.3d 1306 (11th Cir. 2008), *overruled by CSXT I*. The Eleventh Circuit in *Norfolk Southern* rested its analysis on this Court's decision in *Department of Revenue* v. *ACF Industries*, 510 U.S. 332 (1994), which held that subsection (b)(4) may not be invoked to challenge the imposition of a property

tax on railroad property on the ground that certain non-railroad property is exempt from the tax. On appeal, the Eleventh Circuit affirmed on the basis of *Norfolk Southern. CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 350 F. App'x 318 (11th Cir. 2009) (per curiam), *rev'd*, *CSXT I*.

This Court granted certiorari and reversed in *CSXT I*. The Court held that "a state [non-property] tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4) as a 'tax that discriminates against a rail carrier.'" 131 S. Ct. at 1109. It did not address, however, whether CSXT should prevail in its challenge, leaving for the lower courts to decide "whether . . . Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114.

Justices Thomas and Ginsburg dissented. They agreed that "a scheme of tax exemptions is capable of making a tax discriminatory," *id.* at 1115, but would have addressed the merits of CSXT's challenge. They would have rejected that challenge on the ground that a discriminatory tax within the meaning of subsection (b)(4) is "a tax – or tax exemption scheme – that targets or singles out railroads as compared to other commercial and industrial taxpayers," and that CSXT "cannot prove facts that would satisfy that standard." *Id.*

b. On remand, the district court upheld Alabama's taxing scheme following a bench trial. The district court noted that Alabama agreed that "the pertinent issue is whether Alabama's sales and use taxes on diesel fuel discriminate against rail carriers as compared to motor carriers and water carriers based on certain exemptions for these competing transportation modes." Pet. App. 45a; see also *id.* at

51a. Applying that standard, the court found that the sales and use tax does not discriminate against rail carriers as compared to motor carriers because, when the tax is considered along with the highway use tax paid by motor carriers, "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a.

The district court further found that the sales and use tax does not discriminate against rail carriers as compared to water carriers. It explained that CSXT failed to provide evidence of the tax's "alleged discriminatory effects as it relates to water carriers." Pet. App. 64a. It also suggested that the Alabama legislature had a sufficient basis for adopting the sales and use tax exemption for water carriers because eliminating the exemption might not "survive commerce clause scrutiny." *Id.* at 64a-66a.

The court of appeals reversed and invalidated Alabama's sales and use tax on railroad diesel fuel. Pet. App. 1a-29a. It agreed with the district court that the pertinent inquiry is whether Alabama's tax discriminates against rail carriers as compared to their motor and water carrier competitors – and that Alabama conceded that this was the proper standard. *Id.* at 8a, 11a.[4] Applying this comparison between rail carriers and their competitors, the court held that Alabama's sales and use tax is discriminatory because "[r]ail carriers pay the State's sales tax – motor and water carriers do not." *Id.* at 16a.

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[4] The court of appeals made clear, however, that it was not adopting a "bright-line rule for [the relevant comparison for all] § 11501(b)(4) cases," and that "the comparison class should be appropriate to the type of tax and discrimination challenged." Pet. App. 11a-12a & n.4 (internal quotation marks omitted).

The court of appeals further held that Alabama "misse[d] the mark" in defending the sales and use tax on the ground that "the motor carriers pay a roughly equivalent amount of taxes under the fuel excise tax." Pet. App. 12a. The court explained that the text of subsection (b)(4) contains no indication that a railroad's challenge to a single tax ("another tax") as discriminatory must be assessed "against the entire tax structure of the state." *Id.* at 13a (internal quotation marks omitted). It therefore "decline[d] to undertake the Sisyphean burden of evaluating the fairness of the State's overall tax structure," noting that courts are "poorly equipped" to perform this endeavor and that it is fraught with significant "potential for error." *Id.* at 16a (internal quotation marks omitted).

Finally, as an independent ground for invalidating Alabama's tax, the court held that "no one can seriously dispute that the water carriers, who pay not a cent of tax on diesel fuel, are the beneficiaries of a discriminatory tax regime." Pet. App. 17a.

Judge Cox dissented. He agreed that "the appropriate comparison class consists of the stipulated competitors," Pet. App. 18a, but he would have considered the separate tax imposed on motor carriers. In his view, the sales and use tax exemption for motor carriers is not discriminatory because "motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Id.* With respect to the interstate water carriers, however, he "conclude[d] that the district court improperly placed the burden on CSX to provide evidence of the exemption's discriminatory effect." *Id.* He would have found that CSXT established a prima facie case of discrimination and would have

remanded for the district court to determine whether the State could justify the discrimination. *Id.* at 29a.

SUMMARY OF ARGUMENT

Alabama's sales and use tax on diesel fuel, which applies to railroads but exempts interstate motor and water carriers, discriminates against railroads in violation of the 4-R Act.

1. 49 U.S.C. § 11501(b)(4) prohibits state taxes that discriminate against railroads vis-à-vis their competitors. The plain text of subsection (b)(4) permits a challenge to a state's imposition of a tax on railroads from which railroad competitors are exempt. The statutory language prohibits "discriminat[ion]," a broad term that the 4-R Act does not define but that can encompass many different forms of conduct. In *CSXT I*, this Court adopted a definition of "discrimination" that focuses broadly on differential treatment without justification, not merely on instances in which railroads are singled out. The structure of section 11501(b) – in which subsections (b)(1)-(3) specify a comparison class but subsection (b)(4) does not – confirms that Congress placed no constraints on the comparisons that plaintiffs can raise and courts can consider under subsection (b)(4).

The statutory purpose and history reinforce that Congress intended to prohibit taxes that discriminate against railroads vis-à-vis their competitors. The whole purpose of the 4-R Act was to promote the financial stability of the railroads. Allowing states to tax other forms of transportation more favorably (to the extent of exempting them completely) can only undermine the railroads' financial standing. Not surprisingly, this interpretation of the statute is

supported by judicial consensus, the position of the United States, and Alabama's own advocacy below.

2. The court of appeals properly declined to consider other aspects of Alabama's tax scheme in evaluating Alabama's defense of the motor carrier exemption. The Court need not reach this issue, however, because – regardless of how the Court resolves it – the water carrier exemption is unlawful and an independent ground for invalidating Alabama's tax.

In any event, an unbroken line of 4-R Act decisions have declined to consider other aspects of a state's tax scheme in assessing challenges to a particular tax under subsection (b)(4). These decisions are consistent with the language and structure of the statute, as well as this Court's consistent recognition that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Minneapolis Star* v. *Minn. Comm'r of Revenue*, 460 U.S. 575, 589-90 (1983). Legal scholars have confirmed that this Court's concerns about the difficulties of comparing the relative burdens of taxes are well-founded. Given the profound difficulties of evaluating tax equivalency arguments, and the high potential for judicial error, the decision below and the preceding decisions were correct to conclude that Congress could not have intended for federal courts to wade into this daunting inquiry in adjudicating claims under subsection (b)(4).

Alabama relies upon decisions of this Court involving various constitutional challenges to state taxes, but these decisions actually undermine any argument that the Court should consider other aspects of state tax schemes in 4-R Act cases. As a threshold matter, doctrines developed to address constitutional challenges, such as the complementary

tax doctrine, are not controlling in the context of a federal statute. See *Ariz. Pub. Serv. Co.* v. *Snead*, 441 U.S. 141 (1979). Even if the Court were free to import the complementary tax doctrine into subsection (b)(4), an examination of the Court's recent application of the doctrine hardly supports extending the doctrine to this (or any) new context.

And even if the complementary tax doctrine developed by this Court in dormant Commerce Clause cases were to apply, Alabama's scheme fails the criteria outlined in those cases – something neither Alabama nor its *amici* even address. For a number of reasons, the highway use tax and the sales and use tax are not substitutes or proxies for each other.

3. In light of the foregoing legal principles, this case is straightforward. The motor carrier exemption violates subsection (b)(4) because Alabama's principal defense – that motor carriers pay the separate excise tax – is legally unsound. Alabama's remaining argument that railroads suffer no discrimination because they can choose to purchase clear diesel fuel and pay the motor carrier tax is completely fallacious. The interstate water carrier exemption violates subsection (b)(4) because interstate water carriers pay no state tax at all on their fuel, and Alabama's proffered constitutional justification is meritless.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT ALABAMA'S SALES AND USE TAX ON FUEL USED BY RAIL CARRIERS VIOLATES SUBSECTION (b)(4) BECAUSE IT EXEMPTS MOTOR AND INTERSTATE WATER CARRIERS.

A. The Plain Text Of Subsection (b)(4) Permits Challenges To Taxes That States Impose On Rail Carriers, But Not Their Competitors.

"As with any question of statutory interpretation, [the Court's] analysis begins with the plain language of the statute." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009); see also *CSXT I*, 131 S. Ct. at 1107.. Section 11501(b) bars states and their subdivisions from imposing taxes that discriminate against railroads. Subsections (b)(1)-(3) prohibit three modes of property tax discrimination. Subsection (b)(4) is "a catch-all provision," 131 S. Ct. at 1105, that prohibits "'another tax that discriminates against a rail carrier'" – or, as originally enacted, "'any other tax which results in discriminatory treatment of'" a rail carrier. See *supra*, at 4 n.1 (emphases omitted); *CSXT I*, 131 S. Ct. at 1107 n.6 ("we treat the two terms ['another tax' and 'any other tax'] as synonymous"). Because "[t]he statute does not define 'discriminates,'" this Court "look[s] to the ordinary meaning of the word." 131 S. Ct. at 1108; *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

This Court has held that the "ordinary meaning" of "discriminates" – or its variant, "discrimination" – is broad because discriminatory conduct can take many forms. See, *e.g.*, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("'Discrimination' is a term

that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX] a broad reach."); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 284 (1978) (plurality opinion) (Powell, J.) ("The concept of 'discrimination' . . . is susceptible of varying interpretations."); *Dougherty Cnty., Ga., Bd. of Educ.* v. *White*, 439 U.S. 32, 43 (1978) (section 5 of the Voting Rights Act "must be given the broadest possible scope" to "encompass[] the subtle, as well as the obvious, forms of discrimination") (internal quotation marks omitted); *Ark. Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987) (tax discrimination against the press can take several "distinct forms," including "treat[ing] the press differently from other enterprises" and "target[ing] a small group of newspapers"); *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-52 (1977) (describing "various forms" of discrimination against the interstate sale of Washington apples).

Thus, when Congress used the broad and multifaceted term "discriminates" in the catch-all provision, it meant discrimination in all the harmful forms it can take beyond property taxes. See *CSXT I*, 131 S. Ct. at 1112 ("the very purpose of a catch-all provision like subsection (b)(4) is to avoid the necessity of listing each matter (here, each kind of discriminatory tax) falling within it"). And there can be no doubt that state tax discrimination can take many forms, given the complexity and endless variation of state taxing schemes.

One obvious form of tax discrimination that lower courts have recognized under subsection (b)(4) is targeting or singling out railroads by subjecting them to a non-property tax that other commercial entities do not pay. See, *e.g.*, *Burlington N. R.R.* v. *Superior*,

932 F.2d 1185; *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300 (8th Cir. 1991); see also *ACF Indus.*, 510 U.S. at 346-47. But given the purposes of subsection (b)(4), mere targeting does not remotely exhaust the forms of tax discrimination prohibited by the 4-R Act. Nothing in the language, structure, or purpose of the statute in any way suggests that Congress meant to outlaw only such overt forms of discrimination.

Indeed, in *CSXT I*, this Court held that states unquestionably are forbidden from discriminating against railroads in other ways – specifically by exempting some entities from a non-property tax that railroads and others pay. In holding that the ordinary meaning of "discriminates" in subsection (b)(4) encompasses discriminatory tax exemptions, the Court followed a long line of its decisions that "have repeatedly recognized that tax schemes with exemptions may be discriminatory." 131 S. Ct. at 1109; see, *e.g.*, *ACF Indus.*, 510 U.S. at 343 (tax exemptions "could be a variant of tax discrimination"); *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803 (1989); *Ragland*, 481 U.S. 221; *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984).

The Court in *CSXT I* also adopted a definition of "discrimination" that encompasses a wide range of conduct:

> Discrimination is the failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. . . . [D]iscriminates means to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit.

131 S. Ct. at 1108 (citations and internal quotations omitted). This standard focuses broadly on

differential treatment, not merely on instances in which railroads are singled out.

So it is that a tax imposed on railroads, but not their competitors, "discriminates" against railroads under that definition. Railroads and their interstate motor and water carrier competitors are engaged in the same economic activity: the transportation of freight in interstate commerce. All of these carriers purchase diesel fuel for this purpose. Indeed, as the parties stipulated below, "[f]uel costs incurred in the transportation of property in interstate commerce are a major annual operating expense" of all carriers. JA 28-29 ¶ 12. Alabama, however, does not treat carriers "equally" in terms of the taxes they pay: railroads pay a four percent sales and use tax on their diesel purchases (not including local taxes), while motor carriers and interstate water carriers are wholly exempt from this tax. They pay no sales tax at all. This wholly different treatment, which disfavors the railroads, constitutes facial "discrimination" under the definition that the Court embraced in *CSXT I* and, indeed, under any "ordinary meaning" of that term. Accordingly, CSXT's challenge to Alabama's tax scheme fits squarely within the plain language of subsection (b)(4).

Alabama's arguments that the statutory text limits subsection (b)(4) claims to a single, exclusive comparison class – other commercial and industrial taxpayers – are unpersuasive. See Pet. Br. 3. Alabama's main textual argument is that section 11501(b)'s introductory language prohibiting "'discriminat[ion] against interstate commerce'" directs courts exclusively to "compare the taxation of railroads with the taxation of local businesses." *Id.* at 23-24; see also *id.* at 16. Alabama's argument, however, is merely another version of one that this

Court expressly rejected in *CSXT I*. There, the Court noted Alabama's claim "that § 11501(b) is designed to protect interstate carriers *vis-à-vis* local businesses," but held that "the text of § 11501(b) tells a different story." 131 S. Ct. at 1109 (internal quotations omitted). It explained that, "[c]onsistent with the Act's purpose of restoring the financial stability of railroads (not interstate carriers generally)," the "distinctions drawn in § 11501(b) are not between interstate and local actors . . . but rather between railroads and other actors, whether interstate or local." *Id.* This textual analysis forecloses Alabama's argument that subsection (b)(4) prohibits only discrimination against railroads as compared to local entities, and does not encompass discrimination against railroads as compared to other interstate carriers.[5]

Alabama likewise is incorrect that the Eleventh Circuit violated its "obligation to maintain the consistent meaning of words in statutory text" by finding that different comparison classes are appropriate in different subsection (b)(4) cases. See Pet. Br. 29-30 (internal quotation marks omitted); Pet. App. 11a-12a nn. 3-4. As shown, Congress used a term – "discrimi-nat[ion]" – that is broad and encompasses many different forms of conduct. It also

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[5] Alabama's observation that the language in section 11501(b) prohibiting "'discriminat[ion] against interstate commerce'" is similar to language in the Interstate Commerce Act does not advance its argument. *See* Pet. Br. 27-29. It is true that one of the purposes of the Interstate Commerce Act is to prevent states from "treating interstate business worse than local business." *Id.* at 29. The 4-R Act, however, has broader purposes. This Court correctly concluded in *CSXT I* that the purpose of subsection (b)(4) is to protect the financial health of railroads by prohibiting taxes that discriminate against them vis-à-vis interstate as well as local entities.

did not specify any comparison class. See Section IB. Accordingly, the Eleventh Circuit's holding that subsection (b)(4) does not direct the use of a single comparison class is fully consistent with, and indeed compelled by, the statutory text.

B. The Structure Of Section 11501(b) Confirms That Subsection (b)(4) Does Not Direct The Use Of A Single Comparison Class.

Because "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) (internal quotation mark omitted), the structure of section 11501(b) provides additional insight into Congressional intent. See also *id.* (a provision may be "clarified by the remainder of the statutory scheme") (internal quotation mark omitted). Here, the structure of section 11501(b) confirms that Congress did not direct the use of a single comparison class in subsection (b)(4).

As this Court has recognized, subsections (b)(1)-(3) of section 11501 – the provisions that address property taxes – specify one (and only one) comparison for taxes imposed on railroad property: the taxes imposed on "commercial and industrial" property. *ACF Indus.*, 510 U.S. at 340 ("'[c]ommercial and industrial property' . . . serves as *the* comparison class for measuring unlawful discrimination under" subsections (b)(1)-(3)) (emphasis added). Thus, subsections (b)(1)-(3) restrict courts to a single, exclusive comparison class for claims of property tax discrimination.

Subsection (b)(4), in stark contrast, does not contain any such restriction or specify any comparison class. See *CSXT I*, 131 S. Ct. at 1114 (subsection (b)(4) is drafted "more broadly" and does

not include "any of the prior subsections' limitations"). Under well-settled principles of statutory construction, Congress's omission of a comparison class in subsection (b)(4) – when it specified one in the preceding three subsections – carries significant interpretive meaning. See *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (where "Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). Thus, the structure of section 11501(b) reinforces the ordinary meaning of the text of subsection (b)(4): Congress did not intend to limit railroads to challenging non-property taxes that treat them differently as compared to commercial and industrial taxpayers – or any other fixed class. Congress therefore placed no constraints on the comparisons that plaintiffs can raise and courts can consider under subsection (b)(4). This Court should not impose an arbitrary constraint that Congress itself clearly chose not to embrace.

Alabama asserts the contrary structural argument, viz., that commercial and industrial taxpayers should be the exclusive comparison class for subsection (b)(4) cases because "[t]he phrase '*another* tax that discriminates' . . . harkens back to the other three subsections and the specific comparison-class language found therein." Pet. Br. 26 (emphasis in original); see also Br. of State & Local Gov't Orgs. ("State & Local Br.") 13-14; Br. for Am. Trucking Ass'ns, Inc. ("ATA Br.") 10. This construction completely ignores that Congress readily could have specified the same comparison class in subsection (b)(4), but did not. Alabama's construction therefore

improperly "depends upon the addition of words to a statutory provision which is complete as it stands." *Burlington N. R.R.* v. *Okla. Tax Comm'n*, 481 U.S. 454, 463 (1987) (rejecting interpretation of the predecessor to subsection 11501(b)(1) that "would require amendment rather than construction of the statute"); see also *CSX Transp., Inc.* v. *Ga. State Bd. of Equalization*, 552 U.S. 9, 19 (2007) (rejecting interpretation of subsection 11501(b)(1) that "'depends upon the addition of words'") (quoting *Okla. Tax Comm'n*). Alabama's interpretation is thus both atextual and contrary to the statutory structure.

Alabama's construction likewise ignores this Court's determination in *CSXT I* that subsection (b)(4) should not be interpreted "to replicate each facet of subsections (b)(1)-(3)." 131 S. Ct. at 1113. As the Court explained, Congress "dr[ew] a sharp line between property taxes and other taxes," and omitted from subsection (b)(4) many of the limitations from the prior subsections. *Id.* at 1114. In particular, although Congress "expressed its intent to insulate property tax exemptions from challenge," it "drafted § 11501 to enable railroads to contest *all other tax exemptions*." *Id.* at 1112 (emphasis added). Accordingly, "Alabama's preference for symmetry cannot trump an asymmetrical statute." *Id.* at 1114.

Alabama's *amici* invoke principles of federalism to argue that the 4-R Act's limits on state taxing authority should be narrowly construed. State & Local Br. 7-10; Br. of Multistate Tax Comm'n ("MTC Br.") 13-16. But as this Court recognized in *CSXT I*, Congress's very purpose in section 11501 was to curb state taxing power as applied to railroads and, therefore, "[p]rinciples of federalism cannot narrow § 11501's clear scope." *CSXT I*, 131 S. Ct. at 1112. See also *Ga. State Bd. of Equalization*, 552 U.S. at 20

(principles of federalism cannot bar challenges to state valuation methods when subsection 11501(b)(1) "clearly authorized" such challenges).

C. The Statute's Purpose And History Confirm That Congress Intended To Prohibit Tax Discrimination Against Railroads Vis-à-vis Their Competitors.

The "object and policy" of a law also are relevant to its interpretation. *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (internal quotation marks omitted). While the plain language and structure of subsection (b)(4) leave no doubt that Congress intended to prohibit discrimination against railroads as compared to their competitors, that conclusion is strongly reinforced by the 4-R Act's purpose and history.

This Court recognized in *CSXT I* that Congress enacted the 4-R Act to "'restore the financial stability of the railway system of the United States,' among other purposes." 131 S. Ct. at 1105 (quoting 4-R Act, § 101(a), 90 Stat. at 33). One of those other purposes was to "foster competition among all carriers by railroad and other modes of transportation." 4-R Act § 101(b)(2), 90 Stat. at 33. Congress's stated objective of ensuring a non-discriminatory playing field between railroads and their competitors is plainly furthered by recognizing claims of tax discrimination based on blatant and subtle forms of unequal treatment of railroads as compared to other transportation carriers. Indeed, any other rule would allow states to favor non-railroad carriers at the expense of rail carriers in ways that jeopardize the financial health of the railway system, which is the one outcome Congress unquestionably sought to prevent.

The legislative history of the 4-R Act confirms these conclusions. The 4-R Act is a comprehensive statute aimed at "promot[ing] the revitalization of the railroad industry in the United States." S. Rep. No. 94-499, at 1 (1975). Congress recognized that railroads were in need of assistance in part because of their inability, due to a number of factors, "to respond fully to changing economic trends," resulting in the dramatic loss of traffic "to other modes of transportation." *Id.* at 2-3. Congress thus sought to create a legal and regulatory regime that would "permit railroads to effectively compete for the kind of traffic they can best handle," *id.* at 11, with the goal of ensuring "the rail system [can] remain viable in the private sector," H.R. Rep. No. 94-725, at 102. In fact, the 4-R Act's provisions restoring fair competition were seen as a last effort to stave off the "prospect of nationalization." 121 Cong. Rec. 38117, 38118 (1975) (statement of Sen. Vance Hartke) (the Act "is premised on the assumption that the railroad industry can be made profitable and healthy in the private sector of the economy").

Subsection (b)(4) directly advances Congress's intent to foster the railroads' ability to compete against other modes of transportation. Indeed, when it initially investigated the burdens of state taxation on commerce, Congress was concerned with "the relative tax burdens on truck, air, bus, pipeline, water, and railroad carriers." Doyle Report, at 449; see also *id.* at 450 ("[R]ailroads and pipelines are more burdened by tax policies of government than their competition . . . ."). The need for "remedial national legislation," *id.* at 451, was born of the concern that "the railroad industry suffers most from the burdens" that section 11501(b) "would remove" – that is, "discriminatory tax practices." Sen. Rep. No.

91-630, at 3. Discriminatory tax burdens that states imposed upon different interstate carriers were thus from the outset part of what Congress deemed to be discrimination against interstate commerce.

The court of appeals therefore correctly concluded that, "in light of the 4-R Act's purpose of ensuring 'financial stability' for rail carriers, the competitive mode[] best serves that goal in the context of a state's sales tax on diesel fuel." Pet. App. 11a; see also *Burlington N., Santa Fe Ry. Co.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) (adopting the competitor comparison class because the 4-R Act's purpose of restoring the railroads' financial stability cannot be achieved "without making the railroads competitive"); *Burlington N. R.R.* v. *Comm'r of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993) (same).

Alabama simply ignores the foregoing aspects of the statute's purpose and history in arguing that "section 11501 was *only* intended to tie interstate carriers to the general mass of taxpayers," and this was all the railroads requested. Pet. Br. 30-33 (emphasis added). To be sure, in the hearings leading up to the 4-R Act, the railroads emphasized their vulnerability as "non-voting, nonresident businesses" to discriminatory state taxes, and Congress undeniably sought to remedy that vulnerability. *W. Air Lines*, 480 U.S. at 131. But as the court of appeals and other courts correctly recognized, Congress also intended to ensure the economic survival of railroads by guaranteeing them a level playing field with their competitors. Recognizing the competitor comparison class in defining discrimination under the 4-R Act directly furthers this vital Congressional purpose to protect the rail freight system.

There likewise is no merit to Alabama's related contention that the broader comparison class of

commercial and industrial taxpayers serves the statutory purpose and "provides the railroads with all the protection they need" because it ties the fate of the railroads to a large group of local taxpayers who can presumably influence the legislative process. Pet. Br. 35-36. The flaw in this argument is that the broader comparison class only serves part of the statutory purpose. It protects railroads against taxes that single them out, but leaves railroads with no protection or remedy at all against taxes that disadvantage them as compared to their competitors – even though, as shown above, Congress plainly meant to prohibit that type of discrimination. The only way to provide the full protection that Congress intended is for courts to use the comparison class that is appropriate to the tax scheme at issue and the form of discrimination under scrutiny, as the Eleventh Circuit correctly recognized.

Contrary to Alabama's assertion, Pet. Br. 33-35, the fact that the railroads' competitors supported section 11501 is not at odds with the court of appeals' recognition of the competitor comparison class. This support is easily explained: Congress considered "including common carriers other than railroads within the scope of the prohibition on discrimination." Br. for the United States as *Amicus Curiae* Supporting Neither Party ("U.S. Merits Br.") 20. Indeed, up until the final conference on the bill, the Senate version of subsection (b)(4) applied to all common carriers. See S. Rep. No. 94-595, at 166 (1976) (Conf. Rep.) (noting that the conference substitute "limited the provision" to railroads). In any event, even as finally enacted, section 11501 served the interests of all common carriers. As the ATA explains, it "supported the inclusion of Section 11501 in the 4-R Act" because of "the shared need to protect

all interstate carriers from [state] predation." ATA Br. 9 (emphasis in original). Section 11501 indisputably served that purpose by putting the states on notice that they could no longer pick on interstate carriers to fill their tax coffers. Recognizing claims of tax discrimination based on unequal treatment of railroads as compared to other transportation carriers does not detract from the substantial benefits that these competitors received from that clear legislative message.

D. Judicial Consensus, The Position Of The United States, And The Position Of Alabama Below Confirm That Competitors Are An Appropriate Comparison Class Under Subsection (b)(4).

Even though the district court judge and the dissenting court of appeals judge disagreed with the panel majority on the correct outcome of this case, they both agreed that CSXT's claim of discrimination as against its competitors is cognizable under subsection (b)(4). Pet. App. 18a ("the appropriate comparison class consists of the stipulated competitors") (Cox, J., dissenting); *id.* at 45a ("the pertinent issue is whether Alabama's sales and use taxes on diesel fuel discriminate against rail carriers as compared to motor carriers and water carriers") (district judge).

This also is the considered judgment of other lower courts, which uniformly have held that claims by railroads that their competitors receive preferential tax treatment are cognizable under subsection (b)(4). Several courts have invalidated as discriminatory similar state sales and use taxes paid by railroads that exempted the railroads' competitors. *Union Pac. R.R.* v. *Minn. Dep't of Revenue*, 507 F.3d 693 (8th Cir.

2007); *Burlington N. Santa Fe Ry.* v. *Lohman*, 193 F.3d 984; *Burlington N. R.R.* v. *Comm'r of Revenue*, 509 N.W.2d 551; *Kan. City S. Ry.* v. *Bridges*, No. CIV.A.04-2547, 2007 WL 977552 (W.D. La. Mar. 30, 2007); *Ill. Cent. R.R.* v. *Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892 (M.D. Tenn. 2013), *appeal pending*, No. 13-6348 (6th Cir. filed Oct. 16, 2013). Courts have also employed the competitor comparison class when enjoining taxes on railroad diesel fuel other than sales and use taxes. *Atchison, Topeka & Santa Fe Ry.* v. *Bair*, 338 N.W.2d 338, 346 (Iowa 1983); *Burlington N. R.R.* v. *Triplett*, 682 F. Supp. 443, 445-46 (D. Minn. 1988).

Even courts that have employed a broader comparison class – all commercial and industrial taxpayers – in specific subsection (b)(4) cases have not adopted a categorical rule that this is the *only* proper comparison class for all claims brought under that subsection. See *McNamara*, 817 F.2d at 375-76; *Kan. City S. Ry.* v. *Koeller*, 653 F.3d 496, 508-09 (7th Cir. 2011). Indeed, the Seventh Circuit in *Koeller* expressly disclaimed that view, holding that "'the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case.'" 653 F.3d at 509 (quoting *Lohman*, 193 F.3d at 986).[6]

This is also the view of the United States. See U.S. Merits Br. 12 (the court of appeals correctly held "that the comparison class may vary depending on

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[6] The only decision to the contrary is the Ninth Circuit's split decision in *Atchison, Topeka & Santa Fe Railway* v. *Arizona*, 78 F.3d 438 (9th Cir. 1996), but *Atchison* is no longer good law because its conclusion that the tax exemption at issue could not be challenged under subsection (b)(4) was overruled by *CSXT I*. In addition, no court in the Ninth Circuit has cited *Atchison* in the 18 years since it was decided.

the type of discrimination alleged, and that a comparison class consisting of respondent's direct competitors was appropriate in this case"); see also Tr. of Oral Arg., *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, No. 09-520, at 17 (Nov. 10, 2010) (the Court "should reject the notion that the only comparison class in a (b)(4) case, no matter what the (b)(4) case looks like, is all other commercial and industrial taxpayers") (counsel for U.S.).

It likewise was the view of Alabama throughout the proceedings below. As the district court and the court of appeals found, Alabama conceded at every stage of the remand proceedings that competitors are the proper comparison class, and litigated this case by drawing that very comparison. See Pet. App. 8a ("In the proceedings below, the district court and the parties adopted the competitive approach, assuming that CSX must be compared with only motor and water carriers."); *id.* at 51a ("the parties here agree on a different class for comparison purposes – the competitive mode class, not the 'all other commercial and industrial taxpayers' class"); see also *id.* at 11a, 45a; U.S. Merits Br. 7-9, 21. This plainly was a deliberate litigation strategy because this Court in *CSXT I* expressly noted that Alabama had potentially waived this very issue on the record before it, 131 S. Ct. at 1107 n.5, yet thereafter on remand, petitioners nonetheless failed to contest the issue in either the district court or the court of appeals.[7]

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[7] Alabama contended in its petition that the district court and Eleventh Circuit judges who heard this case – all four of them – were "mistaken" about what it preserved before them. Pet. 15-17. But as CSXT demonstrated in its opposition, the record belies this contention. Opp. 18-23. Assuming *arguendo* there was any error by the lower courts in construing Alabama's position on the comparison class, it was caused by the confusing

Alabama therefore forfeited any argument that use of this comparison class was improper and the Court should reject its current position on this basis. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (declining to reach issue that "was not raised below"); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (same); see also *Freytag* v. *Comm'r*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (parties cannot "suggest[] or permit[], for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claim[] that the course followed was reversible error").

E. The Other Arguments Of Alabama And Its *Amici* Are Unavailing.

Alabama and its *amici* assert that recognizing the competitor comparison class would turn railroads into "most-favored taxpayers." See, *e.g.*, Pet. Br. 4, 40-42; State & Local Br. 26; ATA Br. 13. But this Court rejected a similar assertion in *CSXT I*. See *CSXT I*, 131 S. Ct. at 1109 n.8. Likewise, the Court should reject Alabama's argument here. As the Court explained in *CSXT I*, its holding that tax exemptions are actionable under subsection (b)(4) did not provide any "'windfall'" to railroads. *Id.* Instead, railroads are only entitled to relief if they can *prove* discrimination: different tax treatment for which the state cannot provide a "sufficient justification." *Id.* Accordingly, allowing railroads to challenge taxes based upon unequal treatment of them and their competitors only ensures railroads a level playing field with their

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nature of Alabama's pleadings. This Court typically does not come to the aid of parties who engage in studied ambiguity in order to invite the error of which they complain. *See City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

competitors – one of the purposes of the 4-R Act. It does not confer preferential treatment.[8]

Alabama contends that the competitor comparison class would create uncertainty because identifying a railroads' competitors can be difficult. Pet. Br. 39-40; MTC Br. 20-23; State & Local Br. 15-16 n.6. This concern has no application here. Railroads have a finite universe of potential competitors (principally motor, water, and air carriers), and determining the relevant comparison for a particular jurisdiction would be a routine inquiry for a court or legislative body. In the instant litigation, it is not even a matter of dispute. The parties stipulated that CSXT's competitors in Alabama are interstate motor and water carriers, JA 28 ¶ 10, and CSXT has entered into similar stipulations in other cases. And the courts have uniformly identified motor and water carriers as the railroads' competitors. See, *e.g.*, *Bair*, 338 N.W. 2d at 346; *Triplett*, 682 F. Supp. at 445-46; *Union Pac. R.R.*, 507 F.3d at 695; and *Lohman*, 193 F.3d at 986.

Alabama further asserts that this comparison class can lead to confusion and unfair results among local jurisdictions, some of which have water carrier traffic

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[8] Alabama's characterization of Tennessee's Transportation Fuel Equity Act of 2014, and the railroads' recently-filed 4-R Act challenge to that legislation, is incorrect. *See* Pet. Br. 42-44; Br. of the States of Tennessee, et al. ("Tennessee Br.") 4-5, 14-17. A complete discussion of that pending litigation is beyond the scope of this brief, but the key point is that the railroads' legal theory is that the new tax singles out and targets railroads for discrimination, and is illegal regardless of whether the comparison class is "commercial and industrial taxpayers" or the railroads' competitors. Accordingly, this litigation is not "a real-world example of unfairness" that results from use of the competitor comparison class. Pet. Br. 42.

and some of which do not. Pet. Br. 39; Br. of Alabama Cities and Counties ("Alabama Cities Br.") 33-34. This assertion is nonsense and exhibits a complete misunderstanding of how local taxes are imposed in Alabama. Under Alabama law, local sales and use taxes must "parallel[]" the state tax (except as to the tax rate). Ala. Code § 40-12-4(b). Thus, if the state sales tax violates subsection (b)(4), then the local levy necessarily violates subsection (b)(4) and there would not be a separate factual inquiry with respect to local levies.

II. THE COURT OF APPEALS PROPERLY DECLINED TO CONSIDER OTHER ASPECTS OF ALABAMA'S TAX SCHEME.

Even though Alabama did not raise this issue in its petition for certiorari, the Court directed the parties to address the following question: "Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision."[9]

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[9] Alabama consciously forfeited this issue. It was one of two questions concerning the meaning of "discriminat[ion]" in subsection (b)(4) that this Court expressly left open in *CSXT I*, 131 S. Ct. at 1107 n.5, and it was presented and litigated in the remand proceedings. The opinions of both lower courts contain extensive discussions of this issue. Pet. App. 12a-17a, 55a-62a. On this record, there can be no doubt that Alabama could have presented in its petition for certiorari the question that the Court poses, but simply chose not to do so. Given Alabama's deliberate decision *not* to present this additional question in the petition, it is not properly before the Court. Sup. Ct. R. 14.1(a). *See* Br. for the United States as *Amicus Curiae* at Pet. Stage, ("U.S. Pet. Stage Br.") 10, 21 (this issue is not "fairly included" within the question presented and Alabama therefore "abandoned" it). The Court should not encourage litigants who raise federal statutory questions to follow one strategy in hopes

Before addressing this issue, CSXT notes that this question only affects Alabama's defense of the exemption from its sales and use tax for motor carriers (who pay the separate motor fuels tax), not the exemption for interstate water carriers. See U.S. Merits Br. 33. It is undisputed that interstate water carriers "pay no tax whatsoever on their diesel fuel purchases." Pet. App. 3a. Alabama therefore has not sought to justify the exemption for interstate water carriers based on any other tax. Consequently, no matter how this Court resolves the "other tax" issue, the decision below should be affirmed because the court of appeals' holding that the interstate water carriers "are the beneficiaries of a discriminatory tax regime," *Id.* at 17a, stands as an independent ground for the court's determination that the tax is unlawful. CSXT's analysis of the "other tax" issue follows.[10]

A. The Court Of Appeals' Decision Is Consistent With The Statutory Language, This Court's Precedent, And Economic Principles.

The Eleventh Circuit correctly rejected Alabama's attempt to defend the motor carrier exemption "on the ground that the motor carriers pay a roughly equivalent amount of taxes under the fuel excise tax."

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that the Court, by inviting the views of the United States, will expand the scope of the issues presented. Alabama was the master of its questions presented and should be forced to abide by the obvious choice it made.

[10] Contrary to Alabama's assertion, *see* Pet. Br. 3-4, 44-46, the court of appeals did not disregard this Court's holding in *CSXT I* that discrimination is not merely dissimilar treatment, but rather dissimilar treatment without justification. 131 S. Ct. at 1109 n.8. Instead, the court of appeals considered Alabama's proffered justifications and found them insufficient to justify the discriminatory tax.

Pet. App. 12a. This holding followed an unbroken line of 4-R Act decisions that have declined to consider other aspects of a state's tax scheme in assessing challenges to a particular tax under subsection (b)(4). See *McNamara*, 817 F.2d at 376-78; *Trailer Train*, 929 F.2d at 1302-03; *Superior*, 932 F.2d at 1187-88; *Burlington N. R.R.* v. *Comm'r of Revenue*, 509 N.W.2d at 554; *Lohman*, 193 F.3d at 986; *Bridges*, 2007 WL 977552, at *6-7; *Union Pac. R.R.*, 507 F.3d at 695-96; see also *Gen. Am. Transp. Corp.* v. *Kentucky*, 791 F.2d 38, 41 (6th Cir. 1986) (addressing challenge under subsection 11501(b)(3)). As the United States acknowledged at the petition stage, "[n]o court of appeals has adopted a contrary approach." U.S. Pet. Stage Br. 18.

These decisions are consistent with, and relied upon, the language and structure of the statute. As the Eleventh Circuit reasoned, the statute "speak[s] in the singular about 'another tax,'" and contains no language indicating that courts should assess other taxes. Pet. App. 13a; see also *McNamara*, 817 F.2d at 377 (the 4-R Act "precludes the difficult analysis" of other taxes because the statute focuses on "particular assessments and particular taxes" and "[t]here is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state"); *Superior*, 932 F.2d at 1188 (Posner, J.) ("Reading subsection (b)(4) . . . in light of the approach taken in the first three subsections, we infer a congressional desire that courts avoid the thicket of incidence analysis" and the consideration of offsetting tax burdens).

The decision below and its antecedents also are consistent with this Court's precedent. This Court repeatedly has declined to compare the relative

burdens of taxes because of the complexity of that inquiry and the inherent limitations of the judicial process. As the Court explained in *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 589-90 (1983) (footnotes omitted), in rejecting a proposed rule allowing a state to impose a tax on the press "as long as the effective burden was no different from that on other taxpayers":

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.

Also, cases in the dormant Commerce Clause arena, while not applicable to this case (because Congress has expressly limited the states' power to impose discriminatory taxes) are similarly instructive. Certainly the requirements for sufficient justification of a facially discriminatory tax under the 4-R Act should be no less stringent than under the dormant Commerce Clause. See *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 341-42 (1996) (noting "the general difficulty of comparing the economic incidence of state taxes paid by different taxpayers upon different transactions" and the "extreme complexity" of the analysis); *Or. Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 105 (1994) (declining to "'plunge . . . into the morass of weighing comparative tax burdens' by comparing taxes on dissimilar events") (quoting *Am. Trucking Ass'ns., Inc.* v. *Scheiner*, 483 U.S. 266, 289 (1987)); *Associated Indus. of Mo.* v. *Lohman*, 511 U.S. 641, 655 n.5 (1994) (courts should "avoid[] being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed

on disparate activities throughout the complex structure of a State's tax system"); *Gen. Motors Co.* v. *Tracy*, 519 U.S. 278, 309 (1997) (the Court is "reticent . . . to engage in elaborate analysis of real-world economic effects or to consider subtle complementary tax defenses") (citation omitted); *Dep't of Revenue* v. *Davis*, 553 U.S. 328, 355 (2008).

Legal scholars have agreed that this Court's concerns about the difficulties of comparing the relative burdens of taxes are well-founded. As Professor Walter Hellerstein explained in a seminal article on this topic, determining the economic incidence of a tax – that is, "the ultimate distribution of its burden" – requires analysis of many complex and interlocking economic factors, including "[e]lasticities of supply and demand," the "industrial structure of the market," the "applicable time frame," as well as "a variety of other factors," including

> whether (1) the taxed product is a final or intermediate good, (2) the tax is large or small, (3) prices are rising or falling, (4) the costs of the taxed enterprise are increasing or decreasing, (5) the factors of production are mobile, (6) the taxed industry is subject to government regulation, and (7), in the federal system, the state imposing the tax dominates the market for the taxed good or service.

Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 438-39 (1986) ("*Hellerstein*"); see *Fulton*, 516 U.S. at 341 n.7 (citing *Hellerstein* on this point). Complicating matters further, these factors "are not necessarily independent." *Hellerstein*, at 438-39. And identifying them "is only the beginning of the economic analysis of tax incidence": "[o]ne must then quantify [them] to actually measure the distribution

of tax burdens." *Id.* at 440. As a result, comprehensive and accurate tax incidence analysis is, at worst, "practically impossible," Shoked, *The Community Aspect of Private Ownership*, 38 Fla. St. U. L. Rev. 759, 810 (2011), and, at best, "understandable only to those who both are comfortable with mathematical expressions and have a reasonable amount of time for study," Schoettle, *Commerce Clause Challenges to State Taxes*, 75 Minn. L. Rev. 907, 915-16 (1991).

Professor Hellerstein thus cautioned that judicial efforts at economic equivalence analysis are "extremely troublesome," especially since "[t]he conditions necessary to create exact economic equivalence . . . are rare indeed." *Hellerstein*, at 451. Because "the inquiry to determine the question of equivalence is fraught with complexity and uncertainty" and the "practical difficulties of pursuing" the necessary economic analyses are "formidable," Professor Hellerstein ultimately concluded that courts may be incapable altogether of "resolving issues of economic equivalence." *Id.*

Given the profound difficulties of evaluating tax equivalency arguments, and the high potential for judicial error, the decision below and the preceding decisions were quite correct to conclude that Congress could not have intended for federal courts to wade into this daunting inquiry in adjudicating claims under subsection (b)(4). Congress enacted section 11501 to end state tax discrimination against railroads. Congress therefore used "categorical language" in subsection (b)(4) to provide the railroads with comprehensive protection from these practices – both subtle and overt – and this language "demands bright-line rules for simple judicial administration." *McNamara*, 817 F.2d at 378. Tax equivalency

analysis, which is "extraordinarily costly both to the parties and the judicial system," *id.* at 377, is the polar opposite of a bright-line inquiry that courts can undertake with a high degree of confidence. Instead, it is an inquiry that can devolve into an "unproductive 'battle of the experts'" with a high risk of error. *Id.* at 378-79. Judicial errors that cut against railroads would eviscerate the purposes of the 4-R Act and the protections that it provides to the railroad industry. *Superior*, 932 F.2d at 1188 (the "congressional policy directive" of the 4-R Act does not permit the states to place "staggering burdens of inquiry on the judicial system").

The court of appeals also correctly determined that the inquiry requested by Alabama is not any less onerous merely because the State's proffered justification invokes a comparison of only two taxes, rather than an analysis of its entire tax scheme. As the court explained, Alabama's proffered justification implicates the full complexity of tax equivalency analysis because the court would have "to decide whether a state's fixed-percentage sales tax for one market participant is roughly equivalent to an *ad valorem* excise tax for another market participant." Pet. App. 14a. The court of appeals also correctly recognized the additional difficulty posed by the fact that "the authoritative value of that assessment would ebb and flow with every oscillation in diesel fuel's market value" – a factor that the district court did not address. *Id.* at 15a; see also *id.* (recognizing that the dynamic nature of the equivalence inquiry could provoke serial litigation or require ongoing judicial assessment). The court of appeals also properly recognized that a meaningful tax equivalency analysis would recognize "the added value that the motor carriers receive from being able

to accurately forecast their year-to-year tax burden by virtue of being subject to a fixed excise tax rather than a variable *ad valorem* tax" – another factor that the district court did not consider. *Id.* at 15a n.6.

For all of these reasons, the court of appeals properly "decline[d] to undertake the Sisyphean burden" of evaluating Alabama's argument that the motor carrier exemption to the sales and use tax is justified by the fact that motor carriers pay an allegedly equivalent tax. Pet. App. 16a. That is, the court of appeals properly determined that the correct answer to the additional question posed by the Court is "no."

B. The Arguments Of Alabama And Its *Amici* For A Contrary Approach Are Unsound.

The arguments of Alabama and its *amici* that federal courts should consider "other aspects of the State's tax scheme" in evaluating claims of tax discrimination under subsection (b)(4) principally rely upon decisions of this Court involving constitutional challenges to state taxes under the dormant Commerce Clause, the Supremacy Clause, and the Equal Protection Clause that have considered complementary taxes as a defense. Pet. Br. 45-50; U.S. Merits Br. 23-27. These precedents offer no support for the position that "other taxes" should be considered under the specific federal statute at issue here. To the contrary, they undermine any argument that the Court should extend the complementary tax doctrine into 4-R Act cases.

As the Court itself recognized in *Minneapolis Star*, it has "not always avoided evaluating the relative burdens of different methods of taxation" in certain constitutional challenges to taxes. *Minneapolis Star*,

460 U.S. at 589 n.12. Principal among these are dormant Commerce Clause cases in which the Court has held that a state tax that discriminates against interstate commerce "may be saved from constitutional infirmity if it is a valid 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus.*, 511 U.S. at 647; see also *Or. Waste*, 511 U.S. 93; *Fulton*, 516 U.S. 325. Other examples can be found in tax challenges brought under the Supremacy Clause and occasionally under the Equal Protection Clause.

As a threshold matter, although this Court sometimes has considered other taxes as "a specific way of justifying a facially discriminatory tax" in the context of constitutional challenges, *Or. Waste*, 511 U.S. at 102, such doctrines do not have any application in the context of a controlling federal statute, such as the 4-R Act. This Court's decision in *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979) – which Alabama fails to cite or even address – is instructive. In *Snead*, this Court held that a New Mexico tax on generating electricity within its borders was prohibited by a federal statute that prohibited state taxes on the generation and transmission of electricity that discriminated against out-of-state entities. The Court rejected New Mexico's argument that the "statutory provision is no more than a prohibition of a tax that is invalid under the constitutional test of the Commerce Clause," which "requires examination of New Mexico's total tax structure." *Id.* at 149. The Court explained that "whatever the validity may be of the Commerce Clause test advanced by [New Mexico]," its evaluation of the tax was controlled by "the language of [the federal] statute" and "the expressed intent of

Congress in enacting it." *Id.* at 149-50. It then concluded that the statute dictated that the Court "look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State." *Id*; see also *id.* at 150 (invalidating New Mexico's tax because the "tax *itself*" is discriminatory) (emphasis in original).

As shown above, the language of subsection (b)(4) likewise directs courts to consider the particular tax challenged and its expressed intent leaves no room for considering "other taxes," which renders irrelevant any different approach employed in dormant Commerce Clause or other constitutional cases.[11] Subsection (b)(4) was enacted by Congress categorically to prohibit state taxes that discriminate against railroads – and thereby reflected Congress's recognition that existing constitutional protections were not adequate to protect railroads from state predation. The 4-R Act thus "alter[ed] the legal landscape" and went "beyond [the] minimum protections" of constitutional provisions such as "the Commerce Clause." *McNamara*, 817 F.2d at 376. In addition, tax equivalency analysis is burdensome for the judicial process and presents a high risk of error. This Court's willingness to undertake this thorny inquiry to resolve certain constitutional challenges

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[11] The United States' discussion of *Snead* fails to acknowledge its holding that when Congress has enacted a statute prohibiting tax discrimination, Commerce Clause principles cannot control the question whether "other taxes" can be considered. *See* U.S. Merits Br. 26 n.9. In addition, its purported distinctions of *Snead* do not identify any basis upon which the statutory interpretation could come out differently in this case. This Court's conclusion in *Snead* that nothing in the language of the federal statute permitted it to look beyond the "name[d]" tax that Congress said could not be discriminatory is equally true here.

"in the absence of controlling statute and when the risk of error falls equally on important constitutional interests on both sides," *id.* at 377, does not mean that it is appropriate when the risks of error can fall on the railroads, and thereby eviscerate the very statutory protections that Congress created. See also *Superior*, 932 F.2d at 1187-88 (noting that this Court has sometimes undertaken the "ambitious inquiry" of comparing taxes in constitutional cases, but explaining that "in those areas the Court is operating without the benefit of a congressional policy directive").

Even if the Court were free to import the complementary tax doctrine into subsection (b)(4), an examination of the Court's recent treatment of those principles hardly supports extending the doctrine into that (or any) new context. While Alabama and the United States emphasize the doctrine's long history in dormant Commerce Clause cases, they ignore this Court's most recent decisions, which have significantly narrowed the doctrine's scope and application, due largely to the difficulties of evaluating and comparing the incidence and relative burdens of taxes. As the Court explained in 1994 in rejecting Oregon's complementary tax defense in *Oregon Waste*, "it is often no mean feat to determine whether a challenged tax is a compensatory tax." 511 U.S. at 104. The Court then noted its "reluctance to recognize new categories of compensatory taxes" and stated that use taxes on products purchased out-of-state (which are a mirror-image to sales taxes on in-state purchases) "are the only taxes [the Court has] upheld in recent memory under the compensatory tax doctrine." *Id.* at 105.

Two years later in *Fulton*, the Court reiterated its "*extreme* reluctance to recognize new compensatory

categories" in rejecting North Carolina's complementary tax argument, and confirmed that the difficulty of comparing state taxes "goes a long way toward explaining why [the Court has] so seldom recognized a valid compensatory tax outside the context of sales and use taxes." 516 U.S. at 338, 342 (emphasis added). Since then, the Court has not recognized a valid complementary tax in the dormant Commerce Clause context. See *S. Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999) (rejecting Alabama's complementary tax argument). The Court's recent limiting of the complementary tax doctrine in the dormant Commerce Clause area, based on its current reluctance to engage in tax equivalency analysis, undermines the belated position of Alabama and the United States that the Court should import the complementary tax doctrine into subsection (b)(4).

This Court's occasional consideration of complementary taxes in tax challenges brought under the Equal Protection Clause and the Supremacy Clause is an even weaker basis for extending the doctrine. With respect to the Equal Protection Clause, Alabama cites a single case from 1926, and the United States cites a single case from 1919. Pet. Br. 46; U.S. Br. 26. As far as CSXT has been able to determine, this Court has not employed the complementary tax doctrine in an Equal Protection Clause case since the 1930s. And as Alabama acknowledges, this Court essentially repudiated the mode of analysis in *General American Tank Car Corp.* v. *Day*, 270 U.S. 367 (1926), noting that it has been "bypassed by later decisions" that have required "strict parity" for deeming taxes to be complementary

in the dormant Commerce Clause context. *Associated Indus.*, 511 U.S. at 652; see Pet. Br. 46-47 n.11.[12]

The Supremacy Clause cases are limited to a single, narrow context – state taxes imposed on the federal government and those with whom it deals. This Court, in *Minneapolis Star*, explained that its consideration of complementary taxes in that context is compelled by the unique doctrinal issues that are presented: "The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may . . . *force us*, within limits to compare the burdens of two different taxes." 460 U.S. at 589 n.12 (emphasis added; citation omitted). The Court's reluctant consideration of complementary taxes in those cases is hardly an endorsement for extending it to other areas, much less those governed by an express statutory policy directive.

In sum, the arguments of Alabama and the United States that the consideration of "other taxes" to

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[12] Alabama's related suggestion that the Equal Protection Clause's rational basis test should itself be the standard under subsection (b)(4) is untenable. *See* Pet. Br. 49-50 (arguing that the rational basis test "has the most intuitive appeal for incorporation into the 4-R Act"). Congress did not "incorporate" that standard into subsection (b)(4), and it is easy to understand why. Section 11501 was necessary because the Equal Protection Clause did not provide the railroads with any meaningful protection against discriminatory state taxes, largely because the rational basis test is so deferential to the states. *See Hellerstein*, at 428-29 (noting that "most discriminatory taxes will survive equal protection scrutiny" because "states enjoy extremely broad leeway under the equal protection clause in drawing lines for tax purposes"). Congress could hardly have intended subsection (b)(4) merely to incorporate the existing, minimal protections of the Equal Protection Clause because this would have rendered the statute a dead letter.

resolve subsection (b)(4) claims would fit comfortably with this Court's precedents is incorrect. If anything, this Court's recent retreat from the complementary tax doctrine confirms that the Court should avoid the thicket of tax equivalency analysis.

C. Even If The Complementary Tax Doctrine Applied Here, It Would Not Save Alabama's Tax.

While Alabama and the United States point this Court to precedent in which it has considered "other taxes" as a defense to claims that a particular tax is discriminatory, they do not even mention the legal criteria that the Court has developed to govern such complementary tax defenses, much less discuss how these criteria would apply to Alabama's defense of the diesel sales and use tax exemption for motor carriers. This is not surprising because the complementary tax doctrine would not "save" Alabama's discriminatory tax. Alabama cannot come close to satisfying the relevant criteria under the dormant Commerce Clause.

The Court has held that there are "three conditions necessary for a valid compensatory tax" in the dormant Commerce Clause context: (1) the state must identify the intrastate tax burden "for which the State is attempting to compensate"; (2) the tax on interstate commerce "must be shown roughly to approximate – but not exceed – the amount of the tax on intrastate commerce"; and (3) "the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive prox[ies] to each other." *Fulton*, 516 U.S. at 332-33 (internal quotation marks omitted; alteration in original). Alabama's discriminatory tax does not

satisfy any of these stringent criteria, much less all of them.

At the outset, Alabama's tax unquestionably fails the first condition, which requires the discriminatory sales and use tax on railroad diesel fuel purchases to "compensate" for or offset a burden borne by the motor carriers. The fuel excise tax paid by the motor carriers is used to fund the construction and repair of public highways and bridges. The sales and use tax paid by railroads does not make them share that tax burden: the sales and use tax is not used to pay for highways, but instead is deposited into Alabama's general revenue fund. Thus, the discriminatory sales and use tax is not "designed simply to make [railroads] bear a burden already borne by [motor carriers]." *Associated Indus.*, 511 U.S. at 647. To the contrary, the general revenue collected from the railroads has no bearing upon the motor carriers' tax burden from the excise tax. As a result, Alabama is simply imposing an additional tax burden on railroads to contribute to its general revenue fund that motor carriers do not bear.

This analysis also refutes the argument of Alabama and its *amici* that Alabama's separate diesel fuel taxes on railroads and motor carriers are simply equivalent substitutes, and that Alabama's sales and use tax exemption for motor carriers is necessary to avoid "double taxation." See, *e.g.*, Pet. Br. 57; U.S. Merits Br. 22, 26; Alabama Cities Br. 22; Tennessee Br. 6 (suggesting that Alabama is merely "taxing railroads in provision A and motor carriers . . . in provision B"). The separate taxes are in no way equivalent to or replacements for each other. On-road fuel taxes are essentially user charges that all states impose upon motor carriers (and other vehicle operators) to pay for the construction and

maintenance of the roads that they use. Since railroads do not use that infrastructure – and instead pay to build and maintain their track and other infrastructure on their own – their diesel fuel is rightly not subject to these taxes in any state.[13] Sales and use taxes, in contrast, simply raise revenue for a wide variety of government functions. Some states that have sales taxes, such as Alabama, levy them on railroad diesel fuel, but most states do not (meaning that railroads pay neither tax on their fuel). See, *e.g.*, N.C. Gen. Stat. § 105-164.13(11a); Ohio Rev. Code Ann. §§ 5739.02(B)(14), 5741.02(C)(2); Tex. Tax Code Ann. § 151.331; see also Opp. 24. In addition, some states, such as California, Illinois, and New York, impose their sales and use taxes on fuel used for both highway and non-highway purposes (meaning that motor carriers pay *both* the highway use tax and the sales and use tax).[14] This shows that the two taxes are independent, and not simply "a unitary levy on railroads and motor carriers" that Alabama chose to implement through "separate[ly] name[d]" taxes in "separate provisions" of its tax code. See U.S. Merits Br. 28.

This also reveals the flaw in Alabama's argument that its unequal treatment of railroads and motor carriers under its sales and use tax is justified by the necessity of avoiding "double taxation" of motor carriers. The motor fuel tax and the sales and use tax

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[13] CSXT and other railroads do pay the on-road taxes on the diesel fuel that they use in trucks and other on-road vehicles.

[14] Illinois: 35 Ill. Comp. Stat. Ann. 105/3 (use tax), *id.* 120/2-10 (sales tax), *id.* 505/2 (diesel fuel use tax); California: Cal. Rev. & Tax. Code § 6051 (sales tax), *id.* §§ 60050 *et seq.* (diesel fuel tax); New York: N.Y. Tax Law §§ 282-a to -c (diesel sales and use tax), *id.* § 523 (fuel use tax), *id.* § 1105 (sales tax), *id.* § 1110 (use tax).

not only raise money for separate purposes, but are imposed on completely separate incidences: railroads pay the sales and use tax on the purchase of fuel in Alabama, while interstate motor carriers only pay the tax on fuel consumed on the highway in Alabama. As a result, states can impose both taxes on motor carriers. Alabama's discrimination therefore cannot be justified as a way to avoid an improper "double" tax. And if Alabama's point is that it does not want to impose both fuel taxes on the motor carriers, then there is a non-discriminatory way to do that: exempt both on-road and off-road diesel fuel from the sales and use tax (as most states do). Either way, Alabama cannot claim that its discriminatory sales and use tax is "*necessary* to 'compensate'" for another tax. *McNamara*, 817 F.2d at 376 (emphasis in original).

While Alabama's failure to satisfy the first condition is fatal to any claim that its discriminatory tax is a valid complementary tax, its tax also fails the second and third conditions. The second condition is not satisfied because the amount of sales and use tax paid by railroads does not "roughly approximate" and at times does "exceed" the amount of excise tax paid by their motor carrier competitors – which is not surprising because the taxes operate independently. The district court acknowledged that the taxes paid on diesel fuel by rail carriers and motor carriers are "not precisely the same" and found that the amount of tax paid by railroads often exceeds the tax paid by their motor carrier competitors. Pet. App. 57a. As the district court found, "rail carriers paid more per gallon of diesel fuel than motor carriers in November 2007 through November 2008 and November 2009

through December 2009," although motor carriers paid more at other times. *Id.*[15]

Under the Court's precedent, this fluctuating comparative tax burden violates the second condition. In *Associated Industries*, the Court held that Missouri's 1.5 percent use tax was not complementary to its sales tax, which varied in different localities and sometimes exceeded the use tax and sometimes did not. The Court held that the second condition was not satisfied because the parity of the sales and use taxes was "a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside." 511 U.S. at 648-49. The "parity" between Alabama's sales and use tax and its excise tax likewise depends upon a "fortuity" – the price of diesel fuel – and therefore the discriminatory sales and use tax violates the second condition.

Nor is the third condition satisfied. As shown, these distinct taxes do not in any way serve as "proxies" for each other, much less "mutually exclusive" ones. And, contrary to the characterizations of Alabama and its *amici*, the taxes are not simply "different tax[es] on exactly the same activity." Tennessee Br. 3. Alabama's sales and use tax is imposed on the railroads' *purchase* of diesel fuel in Alabama,

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[15] As the Association of American Railroads ("AAR") noted in its *amicus* brief in the court of appeals, "during the three-year period for which evidence was introduced at trial the relative price range had changed three times." Br. of Association of American Railroads, No. 12-12611, at 16 (Oct. 23, 2012). AAR also presented evidence that "for all or most of the 31-month period following [the three-year period considered by the district court], the taxes paid by rail carriers under Alabama's sales and use taxes have been higher than those paid by motor carriers." *Id.* at 17-18 & n.12.

regardless of where the fuel is eventually used (*i.e.*, whether it fuels a train that travels solely within Alabama or a train that traverses several other states). In contrast, the motor carrier excise tax is effectively levied on the *consumption* of diesel fuel in Alabama, regardless of where it was purchased, by operation of the International Fuel Tax Agreement ("IFTA"). See JA 83-87 (explaining that pursuant to IFTA, motor carriers report the mileage that they travel in each state on a quarterly basis, and a clearinghouse redistributes the fuel taxes that the carriers paid at the pump to the various states in which the motor carriers actually burned the fuel); see also Tennessee Br. 3, 10-11. This means that when a motor carrier purchases diesel fuel in Alabama, but then traverses several other states, Alabama ultimately collects its excise tax only for the portion of the trip within Alabama. See *id.* at 11 ("Motor carriers receive in each jurisdiction a credit or refund for taxes paid on fuel used outside the jurisdiction where it was purchased"). This asymmetry with respect to the actual "event" or "activity" taxed underscores the distinct origins, purposes, and operation of the two taxes, and forecloses any argument that they are "complements."

The foregoing analysis demonstrates that Alabama's discriminatory tax cannot be saved or "sufficiently justified" as a legitimate complementary tax, even under the criteria that this Court has used in dormant Commerce Clause cases. More importantly, it refutes the suggestion of Alabama and its *amici* that considering "other taxes" in this case is a simple matter of reading two statutes, comparing two tax rates and perhaps doing a little arithmetic. As this Court has recognized, and legal scholars have

confirmed, tax equivalency analysis is a complex endeavor that is fraught with difficulty and a high potential for error. Accordingly, Congress could not have intended for it to be undertaken in 4-R Act cases.

III. ALABAMA'S TAX SCHEME VIOLATES SUBSECTION (b)(4).

CSXT has demonstrated that the relevant comparison class is its competitors, *supra* Section I, and that the court of appeals properly declined to consider other aspects of Alabama's tax scheme, *supra* Section II. This case thus becomes "simple[]," Pet. App. 16a, and the conclusion that Alabama has violated subsection (b)(4) is unavoidable. It is undisputed that the appropriate comparison class is rail carriers, motor carriers, and interstate water carriers. See JA 28 ¶ 10. It is also undisputed that "[r]ail carriers pay the State's sales tax" on diesel fuel, but "motor and water carriers do not." Pet. App. 16a. Railroads are thus subject to different tax treatment than their competitors, which constitutes unlawful discrimination unless Alabama can provide a "sufficient justification" for the distinction. *CSXT I*, 131 S. Ct. at 1108, 1109 n.8. Alabama has not done so and its tax is therefore invalid. Contrary to the United States' suggestion, a remand is unwarranted. U.S. Merits Br. 32-33.

A. The Motor Carrier Exemption Violates Subsection (b)(4).

As shown in Section II, Alabama's principal defense of the motor carrier exemption, viz., that motor carriers pay the separate excise tax, is unsound. Alabama's only other argument – raised for the first time in this Court – is that CSXT suffers no discrimination or harm because it can purchase clear

(on-road) diesel fuel instead of dyed (off-road) fuel and thereby pay the same excise tax as the motor carriers. Pet. Br. 7, 55-56; see also ATA Br. 6; MTC Br. 28-29. The tardiness of this argument is not surprising because it is silly: no railroad runs its trains on clear diesel fuel or would ever do so absent an exigency. As an initial matter, Alabama's argument that railroads can avoid the sales tax is no answer to the fact that the tax is illegal. That said, the suggestion that railroads can avoid the sales tax by paying the highway tax is illogical in several respects. Railroads would never willingly choose to pay the highway tax that otherwise does not apply to them and inures to the benefit of their competitors. It is also odd for Alabama to suggest that state and local tax authorities would permit this overt sales tax avoidance scheme, resulting in a reduction in their sales tax revenue.

Moreover, if railroads were to purchase clear fuel, they would also have to pay the federal excise tax of 24.4 cents per gallon. Although railroads could later claim refunds of the federal tax (because the fuel was used off-road), they would be continuously out-of-pocket for these substantial tax payments. Given the time value of money, no railroad would imprudently run its business this way. In short, Alabama's "clear fuel" suggestion is fanciful and cannot provide a justification for its discriminatory tax, which is why it did not subject the argument to scrutiny by the lower courts.

B. The Interstate Water Carrier Exemption Violates Subsection (b)(4).

As shown, Alabama's discriminatory exemption for interstate water carriers is an independent basis for invalidating its tax, and Alabama cannot justify this exemption on the ground that interstate water

carriers pay some other fuel tax (they do not). Alabama's other proffered justifications are easily refuted.

Alabama's principal justification for this exemption is that "there are dormant commerce clause concerns with taxing interstate water carriers that do not exist with respect to railroads." Pet. Br. 57-59.[16] This defense, however, is not supported by Alabama's historical foray into out-of-date Commerce Clause cases and Founding-era sources. Whatever protection interstate water carriers might once have enjoyed from state taxes, it has not survived this Court's decision in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which held that interstate businesses do not have any constitutional immunity from state sales taxes. Notably, several other states currently impose their sales and use taxes on fuel purchased by interstate water carriers.

Moreover, even if Alabama could not constitutionally apply its sales and use tax to interstate water carriers, that would not provide a justification for "*declining to provide the exemption at issue to rail carriers.*" *CSXT I*, 131 S. Ct. at 1109 n.8 (emphasis added). The 4-R Act requires equal tax treatment of railroads and their competitors. Alabama could comply with the Act, without running afoul of any (supposed) dormant Commerce Clause concerns, by exempting both railroads and water carriers from the tax. It is Alabama's failure to provide the same exemption to rail carriers that Alabama cannot justify.

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[16] Alabama's current explanation for the water carrier exemption stands in stark contrast to its admission at the petition stage that "no one appears to know precisely why the legislature created" it. Pet. 5.

Alabama also argues that "no evidence in the record establishes any anti-competitive effect from the interstate water carriers' exemption." Pet. Br. 59. Subsection (b)(4)'s unqualified prohibition against discrimination, however, does not require that CSXT show an "anti-competitive effect." Alabama's reliance on dormant Commerce Clause authority is therefore inapposite. In any event, the lack of "evidence" on this issue is unsurprising because the parties stipulated that interstate water carriers are among the railroads' "principal competitors"; that water carriers are entirely "exempt from sales or use taxes on their purchase of diesel fuel" used for interstate transportation; and that "[f]uel costs incurred in the transportation of property in interstate commerce are a major annual operating expense of rail carriers, motor carriers and water carriers." JA 28-29. These factual stipulations, which "are formal concessions . . . that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof," were more than adequate submissions to establish beyond doubt the existence of discrimination prohibited by subsection (b)(4). *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 677-78 (2010) (internal quotation marks omitted). Those submissions, in sum, are "conclusive." *Id.*[17]

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[17] Alabama's assertion that *intrastate* (as opposed to *interstate*) water carriers "move exceedingly little freight in Alabama as compared to railroads and truckers," Pet. Br. 59, is irrelevant because *intrastate* water carriers are not at issue in this case.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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REPLY BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

This case is about the right answer to a simple question: does Alabama's sales and use tax discriminate against railroads? The answer is no. CSX pays the same sales and use tax that Alabama levies on other commercial and industrial taxpayers, including local taxpayers and other interstate businesses. Motor carriers are exempt from this tax when they purchase diesel fuel because they pay a different tax, and interstate water carriers have long been exempt in light of traditional protections for commerce in interstate waterways. No matter the ground upon which this case is ultimately decided, the bottom-line answer is the same: Alabama's sales and use tax does not discriminate against railroads.

I. The right comparison class is the general class of commercial and industrial taxpayers.

CSX's comparison class arguments are unpersuasive. CSX concedes that courts should not consistently compare the taxation of railroads to the taxation of their interstate competitors. Instead, CSX argues that the right comparison class changes from case to case. But a shifting comparison class finds no support in the 4-R Act's statutory framework, is inconsistent with the Act's history, and provides little guidance for state policymakers trying to impose fair and lawful taxes.

1. The right interpretation of § 11501(b) is the one in Justices Thomas and Ginsburg's separate opinion in *CSX Transportation*: a tax discriminates against railroads when it treats railroads worse than the

general mass of commercial and industrial taxpayers. *See CSX Transp. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1116 (2011) (Thomas, J., dissenting). The statute's design reflects Congress's intent to compare railroads with a class of other commercial and industrial taxpayers, which will necessarily include politically influential local taxpayers and interstate businesses. *See Dep't of Revenue of Ore. v. ACF Indus., Inc.*, 510 U.S. 332, 339-48 (1994). Nowhere does the statute contemplate a comparison class that consists *only* of railroad competitors or a shifting comparison class that depends on the kind of case brought by a railroad.

To argue otherwise, CSX reads this Court's opinion in *CSX Transportation* too broadly. This Court explained that Congress did not replicate "each facet" of subsections (1) through (3) in subsection (4). *See* Resp. Br. 21. But this Court did not say that Congress intended that *no* facet of subsections (1) through (3) should inform the meaning of subsection (4). *See CSX Transp.*, 131 S. Ct. at 1113. Instead, this Court's 4-R Act caselaw recognizes that that the preceding subsections *do* inform the meaning of subsection (4). *See ACF Industries*, 510 U.S. at 339-40.

2. CSX's characterization of the 4-R Act's legislative history actually undermines its position. On the one hand, CSX says that the 4-R Act was designed to help railroads compete with their competitors, Resp. Br. 22-24, but, on the other hand, CSX argues that subsection (b)(4) "applied to all common carriers" until final enactment, Resp. Br. 25. But if Congress wanted railroads to be able to compare themselves to their competitors all along, then it would have been nonsensical for Congress to

include all common carriers in the protection provided by (b)(4). As we explain in our initial brief, motor and water carriers would not have provided extensive support for the 4-R Act to send a "clear legislative message," when that message is, in CSX's view, that railroads can eliminate motor and water carriers' state tax advantages. *See* American Trucking Ass'ns, Inc. Br. 7-13.

The 4-R Act was intended to balance competing interests, not to give railroads an advantage over their competitors and eliminate all state taxes that railroads must pay. Justices Thomas and Ginsburg were right when they characterized § 11501, and subsection (b)(4) specifically, as an attempt to "tackle the issue of systemic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence." *CSX Transp.*, 131 S. Ct. at 1117 (Thomas, J., dissenting). A comparison class of general commercial and industrial taxpayers does just that.

3. CSX also misunderstands or ignores the consequences of its position. CSX does not explain at all how a competitor class can be applied in a consistent and principled way when competitors change from state to state, locality to locality, and over time. CSX cannot answer this question: How will a state or local policymaker know, when some other business is asking for favorable tax treatment, whether acceding to that business's request must also eliminate taxes that railroads pay? If the Court accepts CSX's view of the comparison class, it will be impossible for a state policymaker to predict how providing a tax credit or exemption for one business

group will affect the taxes that railroads ultimately have to pay.

Instead, CSX whistles past the administrability and fairness problems inherent in its "railroads always win" approach. For example, CSX blithely asserts that the ongoing tax litigation in Tennessee is different, without addressing our position that Tennessee's Kafkaesque predicament is a direct result of the shifting comparison class that CSX supports. *See* Resp. Br. 30 n.8. The only difference, as far as we can tell, is that Tennessee capitulated to the railroads' demands only to be sued again because it gave the railroads what they wanted. Under CSX's proposed rule, different treatment is forbidden, and eliminating different treatment is also forbidden. The only limit to CSX's position is the point at which railroads pay no taxes.

4. Lastly, CSX's position on the separate sales and use taxes imposed by Alabama's localities is entirely unclear. *See* Resp. Br. 31. Even if this Court were to rule in CSX's favor, such a decision would not automatically invalidate local taxes by operation of Alabama law. It would instead be an open question, for example, whether counties or cities could continue collecting sales and use taxes on dyed diesel fuel from railroads if the local market for transportation is different than the statewide market. Because CSX's position on the appropriate comparison class necessarily depends on the competitive marketplace in a particular jurisdiction, CSX's position means that 4-R Act litigation can never be resolved on the face of a taxing statute.

* * *

The wrongheadedness of CSX's position is exemplified by its attack on our exemption for

interstate water commerce. In the name of ending discrimination against interstate commerce, CSX demands that we eliminate a tax exemption that only *benefits* interstate commerce. This is not a cognizable claim under the 4-R Act. Because Alabama treats railroads like other commercial and industrial taxpayers who purchase dyed diesel fuel or anything else they need for their businesses, the state's sales and use tax does not discriminate.

II. Courts must consider a state's justifications for treating certain taxpayers differently, including whether the taxpayers pay roughly equivalent taxes.

A discrimination analysis does not end when a plaintiff shows different treatment.[1] Instead, the inquiry turns on why the defendant distinguished between the plaintiff and someone else. That inquiry is no different under the 4-R Act. Indeed, this Court has explained that distinctions made "for some reason having nothing to do with railroads" do not implicate the 4-R Act's protections at all. *CSX Transp.*, 131 S. Ct. at 1109 n.8. The right question is whether there is a reasonable basis for treating railroads differently, not whether an offsetting tax completely eliminates the disparity such that there is actually no difference in treatment at all.

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[1] CSX argues that we forfeited this issue by failing to raise it in our cert petition. Resp. Br. 31 n.9. But as we explained at the cert stage, both questions presented are part of a single inquiry about whether our sales tax discriminates against railroads. *See* Pet. i; Supplemental Brief for Petitioner 3-5. Regardless, the Court granted cert on two questions presented, and CSX does not seriously contend that the Court should dismiss as improvidently granted.

1. As an initial matter, CSX has not meaningfully disputed the district court's fact findings about the comparable tax that truckers must pay. The district court expressly found that Alabama's sales and use tax rate on dyed diesel fuel and its motor fuels tax rate on undyed diesel fuel are "essentially the same." Pet. App. 56a. The district court also found that "motor carriers receive an exemption from paying Alabama's sales and use taxes on diesel fuel *because* they pay a comparable excise tax on this fuel, a tax not imposed on rail carriers." Pet. App. 57a. Because both competitors pay a similar rate, "neither transportation mode is unjustifiably favored." *Id.*[2]

2. Our proposed rule does not impose any burden on courts to engage in a complicated offsetting tax inquiry. This Court has said that states can justify different treatment. *CSX Transp.*, 131 S. Ct. at 1109 n.8. In some cases, like this one, the reasons for the difference have to do with the payment of another tax. Prohibiting any consideration of taxes paid by railroad competitors, as CSX suggests, *see* Resp. Br. 31-44, prevents states from explaining or justifying different treatment.

CSX's position on this front is internally inconsistent. CSX's complaint asks the federal courts to compare the taxes that it pays for diesel fuel to the

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[2] CSX cites an *amicus* brief of the American Association of Railroads, filed in the Eleventh Circuit, in an attempt to circumvent the district court's factfinding. Resp. Br. 48 n.15 (citing Br. of Association of American Railroads, No. 12-12611, at 16 (Oct. 23, 2012)). But this Court should not consider as fact a self-interested association's untested assertions made before another court, especially when the district court made specific factual findings about the similarity of the taxes at issue.

taxes that its competitors pay. It makes no sense for CSX, on the one hand, to ask the courts to compare its taxation to that of its competitors and then, on the other hand, to argue that courts cannot actually perform that comparison. In fact, the very tax exemption that CSX has challenged is provided for in the same section of the Alabama Code that imposes the fuel excise tax truckers must pay. Ala. Code § 40-17-325; *see also* U.S. Br. 30.

CSX protests the application of the "compensatory" or "complementary" tax doctrine. Resp. Br. 41-44; *see also* Tax Foundation Br. 19-25. But the Court need not rigidly "import" this doctrine into the 4-R Act, Resp. Br. 41; it need only apply the principle that a state may exempt an entity from one tax because it pays another, similar tax, *see* Pet. Br. 53, U.S. Br. 21-27. This is as close to a universal principle of taxation as there is: "A rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation." *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 284 (1932). *Cf.* 49 U.S.C. § 11501(c) (explaining that a state's property taxes on railroads need be only within 5% of its assessments on other kinds of property). The state should be able to avoid double taxation by taxing on-road and off-road diesel through different mechanisms.

CSX's reliance on *Arizona Public Service Co. v. Snead* is likewise inapposite. 441 U.S. 141 (1979). First, as we have already explained in our initial brief, neither Alabama nor the United States is asking this Court to evaluate "the entire tax structure" of Alabama. *See id.* at 149. Instead, we are merely asking the courts to weigh our reason for exempting truckers from the sales tax on diesel. Second, the statute at issue in *Snead* was specifically

tailored to address state taxes "on or with respect to the generation or transmission of electricity." 15 U.S.C. § 391; 441 U.S. at 149. By contrast, the 4-R Act prohibits "another tax that discriminates," rather than limiting its scope to any particular taxed item. 49 U.S.C. § 11501(b)(4). *See also* Pet. App. 52a n.9 (explaining why the district court rejected CSX's analogy to *Snead*). There is no "'named' tax" here. *See* Resp. Br. 40 n.11. And as the United States notes, even if the analogy to *Snead* holds, it actually bolsters Alabama's arguments that this Court should consider both kinds of taxes on diesel fuel, just as this Court considered both kinds of taxes on electricity. U.S. Br. 26 n.9.

3. The district court also rightly rejected CSX's invitation to consider Alabama's expenditures in comparing tax rates. Such an evaluation is unsupported by the text, inconsistent with this Court's long-standing precedent, and impractical. Instead, courts should consider the nature of tax burdens on identical taxable items under the 4-R Act, without evaluating state expenditures. *See* U.S. Br. 27-32.

As the district court correctly concluded, the 4-R Act "provides no limitation or instruction for a state or locality's spending of the property tax revenues," and the text indicates nowhere that courts should read such a limitation into subsection (b)(4). Pet. App. 59a; 49 U.S.C. § 11501(b). *See also* Br. of Tennessee, et al., in support of Petitioners at 12-14. The text of the statute is focused on the assessment of discriminatory property taxes, the collection of discriminatory property taxes, and the imposition of other discriminatory taxes. 49 U.S.C. § 11501(b). Nowhere does the statute indicate that the *spending*

or *allocation* of any taxes matters to a determination of whether the tax is discriminatory.

States have long been able to raise revenue and spend it for public purposes. And this Court long ago rejected the idea that revenues obtained from taxing a specific taxpayer should be spent solely for the benefit of that taxpayer. *Kelly v. City of Pittsburgh*, 104 U.S. 78, 80-83 (1881) (rejecting farmer's argument that taxation of his farmland "for ordinary city purposes," including "the water tax, the gas tax, [and] the street tax," violated the Due Process Clause). States may impose taxes for various public purposes, whether or not a particular property owner takes advantage of the supported services at all or in proportion to the tax he or she pays. *Id.* at 81. Education and road maintenance have been proper public purposes on which tax revenues may be spent for decades. *Id.*; *Missouri Pac. R.R. Co. v. Western Crawford Road Imp. District*, 266 U.S. 187, 190 (1924) ("Road building is a public purpose...in which all landowners within the district are interested."). Just as a childless taxpayer cannot object to paying taxes because some of the money he pays may fund public education, *Kelly*, 104 U.S. at 82, CSX cannot object to paying taxes merely because revenues from its taxes support various public purposes from which it only indirectly benefits. *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (concluding that individual taxpayers lack standing to challenge tax credits to businesses, rejecting the argument that the depletion of the treasury is a cognizable injury).

4. It is telling that—in response to our explanation that Alabama law already allows railroads to use on-road diesel and pay the excise tax instead of the sales tax—CSX resorts to name-

calling. *See* Resp. Br. 50-51. Our position is a straightforward reading of Alabama law. And it is not "tardy." Resp. Br. 50-51. We made the same point the last time this case was before this Court in 2009:

> While it is unlawful to use diesel fuel marked for off-road usage on roads and highways without paying Chapter 17's motor fuels excise tax, Ala. Code § 40-17-22, it is lawful to purchase unmarked (on-road) diesel fuel for use off-road. Thus, if rail carriers wanted to avoid the alleged 'discrimination' *vis-à-vis* motor carriers, a rail carrier could purchase unmarked diesel fuel and pay the State's 19¢ motor fuels excise tax, thereby exempting themselves from the State's 4% sales and use taxes.

CSX Transp., Brief of Alabama Department of Revenue et al., 15 n.2 (No. 09-520).

CSX protests that it does not want to buy non-dyed diesel fuel and pay higher *federal* taxes on that item. But federal tax policy is not our problem, and, in any event, CSX recognizes that the federal government will remit those taxes upon a proper application that shows the fuel was used for off-road purposes. Resp. Br. 51. Instead, CSX's position merely proves our point: If CSX actually wanted to pay the same state taxes that the motor carriers must pay, it already could. What it really wants is to pay no taxes at all.

5. We have also explained that our tax exemption for water carriers is justified. Pet. Br. 8-10, 57-59. The district court agreed. Pet. App. 62a-66a. CSX presented no evidence about any discriminatory effect with respect to water carriers because it

provided no evidence about water carriers' purchase of fuel for use in interstate commerce. *See* Pet. App. 63a-64a. Our brief cites figures about *intra*state water commerce because the only facts in the record about water commerce relate to intrastate commerce, not interstate commerce, underscoring that CSX failed to prove its case. Resp. Br. 53 n.17. Because taxing interstate water carriers raises dormant commerce clause questions, the district court rightly concluded that Alabama was reasonable to avoid taxing interstate water carriers' use of fuel. Pet. App. 64a-66a.

6. Lastly, our proposed rational-basis rule is not "untenable," as CSX argues. Resp. Br. 43 n.12. It is instead a workable rule that provides real benefits for railroads. Before the 4-R Act, states sometimes justified imposing higher taxes on railroads by saying that railroads were inherently more deserving of additional taxes. *See, e.g., Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 368-70 (1940); *Cincinnati, N.O. & T.P.R. Co. v. Commonwealth*, 115 U.S. 321, 336-37 (1885); *Yazoo & M.V.R.Co. v. Board of Mississippi Levee Comm'rs*, 195 So. 704, 707-089 (Miss. 1940). That kind of rational basis, under our proposed rule, is off the table.

Moreover, our proposed rule recognizes the benefit of litigating about the state's rationale in federal court as opposed to state court. The 4-R Act provides an exception to the Tax Injunction Act, which permits railroads to litigate their challenges in a federal forum. 49 U.S.C. § 11501(c). From the beginning of Congress's deliberations over what became the 4-R Act, railroads complained about the burdens of pursuing remedies in state courts. They complained of having to file suit in every jurisdiction

that imposed a tax. *E.g., Discriminatory Taxation of Common Carriers: Hearings on S.927 Before the S. Subcomm. On Surface Transp.*, 90th Cong. 57 (1967) (Statement of Broley E. Travis, Consulting Valuation Engineer, Sacramento, Ca.). They complained of slow state courts with full dockets. *Id.* And in general, state courts were more likely to side against railroads and maintain revenue for state coffers. *See id.* at 54 (Statement of Dr. Harold M. Groves, Professor of Economics, University of Wisconsin). The 4-R Act will fully protect railroads from tax discrimination, even if states can justify treating railroads differently than other taxpayers by pointing to a reasonable basis for the different treatment.

* * *

CSX cannot win this case. Railroads should not be able to hand-pick a comparison class that excludes *all* of the local, politically powerful taxpayers that Congress intended to provide a political "check" against discriminatory taxation. But, if they can, then states have to be able to justify treating railroads differently based on something like a rational basis. Ruling in favor of CSX would mean that, practically speaking, states could not tax railroads at all. That is the result that CSX wants. But it is not what the text, history, or purpose of the 4-R Act requires.

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SUPPLEMENTAL BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL ARGUMENT

The United States has recognized that the lower court got this case wrong and that the issues presented are important enough to warrant this Court's review. Although the United States ultimately recommends denial of certiorari because of vehicle issues, the State has already explained that those purported vehicle issues are immaterial. As explained in the petition (pages 15-18) and reply in support of the petition (pages 4-5), this case presents "fully developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). The court of appeals squarely addressed the main issue presented in the cert petition, which the Court expressly left open the last time this case was before it and which the State plainly raised in the court of appeals. And the court of appeals also squarely addressed the subsidiary issue that the United States suggests that this Court should expressly include in any grant, which the State indisputably raised in the court of appeals. The Court should grant the writ.

A. The circuits are split over the comparison class issue.

The United States rightly concedes that the circuits have divided over the appropriate comparison class to use in evaluating claims under the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4) ("the 4-R Act"). U.S. Br. 15-16. Justices Thomas and Ginsburg have recognized that

"[t]he lower courts have split over the proper scope of the comparison class." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S.Ct. 1101, 1118 n.3 & 4 (2011) (Thomas, J., dissenting) (*CSX I*). The Seventh Circuit has acknowledged that the comparison class question "has divided the circuits," explaining that this Court "declined to resolve the split" in *CSX I*. *Kansas City So. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (7th Cir. 2011).

The United States cannot minimize the split by contending that the lower courts could change the comparison class on a case-by-case basis. U.S. Br. 16. That is not the best, or even a plausible, reading of those decisions. The Ninth Circuit held categorically "that the proper comparison class to use in analyzing discriminatory taxation of the railroads under the 4-R Act is 'all other commercial and industrial taxpayers subject to the taxes.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (9th Cir. 1996). Similarly, the Fifth Circuit has categorically held that a state could satisfy the 4-R Act "only by a more mechanical equality between its taxation of the railroads and its taxation of the class of 'other commercial and industrial' taxpayers generally." *Kansas City So. Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). And the Seventh Circuit concluded that "the appropriate comparison class for subsection (b)(4)" was "the functional, middle group of all other commercial and industrial taxpayers." *Koeller*, 653 F.3d at 509. To the extent the Seventh Circuit left any room for a different comparison class, it contemplated only a "hypothetical" situation where "rail carriers in a later case so dominate the economy that the group of all commercial and industrial taxpayers would overlap almost entirely with that of railroads."

Id. The Eleventh Circuit, Eighth Circuit, and others are on the other side of the split. *See* Pet. 13-15.

B. The petition fairly encompasses the United States' second "issue," but the Court could also expressly grant on that question.

The United States says that there are "two issues" that are "critical to determining whether a tax 'discriminates against a rail carrier' in violation of 48 U.S.C. § 11501(b)(4)." U.S. Br. at 10. The first "issue" is what comparison class courts should look to. The second or subsidiary issue is whether courts should evaluate a state tax in isolation or, instead, evaluate a state's tax structure holistically.

This case can be resolved entirely on the first comparison-class issue. *See also* Pet. 18-19. Under the appropriate comparison class comprising general commercial and industrial taxpayers, as outlined by Justices Thomas and Ginsburg, CSX cannot show discrimination under the 4-R Act. *Id.* at 18; *CSX I*, 131 S.Ct. at 1117 (Thomas, J., dissenting). That issue has split the circuits. And, if the Court rules in favor of the State on that issue, then there is no need to decide what aspects of a local government or state's tax system must be evaluated in a 4-R Act case.

Nonetheless, the question presented is broad enough to encompass the second "issue" as well as the first. The State sought certiorari on a broad question: "Whether a state 'discriminates against a rail carrier' in violation of 49 U.S.C. § 11501(b)(4) when the state generally requires commercial and

industrial businesses, including rail carriers, to pay a sale-and-use tax but grants exemptions from the tax to the railroads' competitors." *See* Pet. at i. In asking whether the tax at issue "discriminates against a rail carrier," the question presented necessarily includes the analysis that a court would need to undertake to make that determination.

As the United States explains, courts under the 4-R Act have "wrong[ly]" focused on the single tax at issue rather than evaluating the entire state tax structure. *See* U.S. Br. 18. Alabama and the United States agree that courts should consider the overall state tax scheme to determine whether a tax is discriminatory against railroads under the 4-R Act, not merely the tax at issue in the litigation. *See id.* This has been the consistent position of the United States over the years,[1] it was fully briefed and litigated in the courts below, and the court of appeals erred when it rejected it.

The State believes that this second or subsidiary question is fairly included within the broad question presented of whether the tax at issue here "discriminates" under the 4-R Act. Nonetheless, if the single question presented in the petition is not broad enough to encompass this issue, then the State agrees with the United States that the Court should also expressly grant on the subsidiary question:

---

[1] For example, the last time this case was before the Court, the United States argued that, if "the Court were to find discrimination but find that maybe, you know, 50 percent of the tax was compensated by this other tax, . . . it should remedy the situation by only enjoining, the discriminatory portion of the tax." *See* Oral Arg. Tr. at 21:18-23. *See also* USA Amicus Br. in Support of Cert at 17 & n.8; USA Merits Br. at 26 n.8.

"Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the state's tax scheme rather than focusing solely on the challenged tax provision." U.S. Br. 23.

C. The United States rightly agrees that these questions are important.

The United States acknowledges that this case presents issues that are "important" and "have significance beyond the facts of this particular case." U.S. Br. 18. These issues are "critical to determining whether" a tax violates the 4-R Act. *Id.* at 9-10. Alabama faces the loss of millions of dollars in revenue, as well as refund claims. Pet. 14. And, as the United States recognized, other states with similar tax schemes face the same risk without guidance from this Court about how to proceed. *Id.*; U.S. Br. 18. For these reasons, this Court should grant Alabama's petition.

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June 3, 2014

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SUPPLEMENTAL BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN RESPONSE TO BRIEF OF THE UNITED STATES

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INTRODUCTION

The Government's opposition to certiorari is absolutely correct about how the Court should dispose of this case: Deny the petition. As the Government confirms, the only question petitioners presented in the petition is not worthy of this Court's review and, in any event, was not preserved below. Respondent submits this supplemental brief solely to address the Government's suggestion that "if the petition is granted, the Court should add [an additional] question." U.S. Br. 23. For numerous reasons, the Court should reject the Government's suggestion.

I. THE GOVERNMENT'S OPPOSITION CONFIRMS THAT THE QUESTION PRESENTED BY THE PETITION DOES NOT WARRANT FURTHER REVIEW.

The sole question presented by the petition is whether a State engages in "discriminat[ion]" within the meaning of 49 U.S.C. § 11501(b)(4) when it "generally requires commercial and industrial businesses" to pay a tax, but "grants exemptions from the tax to the railroads' competitors," Pet. i; see also *id.* at 11 (describing the question as "'the proper scope of the comparison class'" for assessing discrimination claims) (quoting *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1118 n.3 (2011) (Thomas, J., dissenting) (*CSXT II*)).

The Government's brief confirms that this question is not worthy of this Court's review. The Government agrees that there is no conflict in the lower courts because, although lower courts have used different comparison classes to resolve different cases, none has "adopted a categorical rule that there is one and

only one proper comparison class for all cases brought under Section 11501(b)(4). Several courts have expressly disclaimed any such holding." U.S. Br. 16.

The Government also agrees that the court of appeals "correctly resolved" the comparison class issue by holding that "the comparison class may vary depending on the type of discrimination alleged and that, in this case, a comparison class consisting of the rail carrier's direct competitors was appropriate." U.S. Br. 11-14; Opp. 17-18. Petitioners emphasize the Government's assertion that the issue appears to be "'important,'" Supp. Br. of Pet. at 5 (quoting U.S. Br. 18), but they ignore the Government's ultimate conclusion that the "prospective impact" of the question presented is "unclear," given petitioners' failure to establish that other States have tax schemes similar to Alabama's. U.S. Br. 19; see Opp. 24 (showing that "very few States would be affected by the issue presented here").

The Government further confirms that this case is not an appropriate vehicle for addressing the comparison class issue in any event, because "that issue was not actively contested below." U.S. Br. 10; *id.* at 19 (respondent's waiver argument "has considerable support in the record"). Petitioners' failure to press the comparison class issue on remand was clearly a deliberate decision. As the Government points out, *id.* at 19-20, this Court in *CSXT II* expressly noted that petitioners had potentially waived *this very issue* on the record before it, 131 S. Ct. at 1107 n.5, yet thereafter on remand, petitioners still did not "actively contest" the issue in either the district court or the court of appeals. It is difficult to imagine a clearer case of a party's failure to preserve an issue, and this waiver should be fatal to the petition.

II. THE COURT SHOULD NOT ENTERTAIN THE GOVERNMENT'S PROPOSED ADDITIONAL QUESTION.

The Government concedes, as it must, that the petition "presents only the comparison-class question" and that petitioners "have abandoned [the issue whether other aspects of the state tax scheme are relevant to the discrimination inquiry] in this Court." U.S. Br. 10, 19. Notwithstanding its acknowledgement that the "other tax" issue is therefore "not properly before the Court," *id.* at 21, the Government suggests that, if the Court does not deny the petition for the reasons stated above, the Court "should add a second question presented" that addresses this very issue. *Id.* at 22; see also *id.* at 1, 23 (setting out proposed additional question). This contradictory suggestion is unsound and should be rejected.

A. The Government is plainly correct that petitioners abandoned the "other tax" issue in this Court. That issue – one of the two questions concerning the meaning of "discriminat[ion]" in § 11501(b)(4) that this Court expressly left open in *CSXT II*, 131 S. Ct. at 1107 n.5 – was plainly presented and litigated below. See U.S. Br. 21 (noting that this issue was "the one issue [petitioners] *did* litigate below") (emphasis in original). Indeed, petitioners' principal legal theory was that "Alabama's overall tax structure results in approximately equal tax treatment of all carriers," when the sales and use taxes that respondent challenged are considered in conjunction with the excise taxes paid by respondent's motor competitors. Pet. App. 81a. And the opinions of both courts below contain extensive discussions of that issue. *Id.* at 12a-17a, 55a-62a. On this record, it is clear beyond

question that petitioners could have presented here the question that the Government proposes, and petitioners chose not to do so.

Given petitioners' deliberate decision to present only the comparison-class issue in the petition – and not the "other tax" issue – that is the sole question that is properly before the Court. This Court's Rule 14.1(a) is unequivocal: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioners attempt to embrace the Government's suggestion by arguing that the "other tax" question is "fairly included" within the question presented, Supp. Br. of Pet. at 3-4, but the Government itself repudiated that argument, U.S. Br. 21. This was for good reason. This Court in *CSXT II* treated the two questions as separate. In addition, the Government's argument is merely that both questions are relevant to determining whether a tax is discriminatory, and that this Court – if it were to take up the meaning of discrimination – should therefore address both questions so that lower courts do not receive "incomplete guidance." *Id.* at. 22. This Court, however, repeatedly has held that "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992)). Thus, because neither of the two questions is "subsidiary to the other," *Yee*, 503 U.S. at 537, the "fairly included" language in Rule 14.1(a) does not apply here.

The Government's suggestion also is contrary to the purposes of Rule 14.1(a). As this Court has explained, a litigant seeking review in this Court "controls the

scope of the question presented" and can "frame the question as broadly or as narrowly as he sees fit." *Yee*, 503 U.S. at 535. Rule 14.1(a), however, provides clear notice that once the petitioner has chosen the issues it seeks to bring before the Court, it will be bound by its selection in order to preserve the integrity and efficiency of the certiorari process and to avoid unfairness to respondents. *Id.* at 535-36. Thus, this Court should not add a new question that petitioners consciously forfeited. Rule 14.1(a) does not allow the Government to rewrite petitions in the guise of expressing its views.

B. The Government's proposed additional question does not warrant review in any event. As the Government concedes, there is no conflict in the lower courts on the "other tax" issue, and no court of appeals has adopted its proposed approach. U.S. Br. 18. In addition, as with the comparison-class issue, the "prospective impact" of this issue is, at best, "unclear." *Id.* at 19.

What the Government and petitioners fail to acknowledge is that this case is not a suitable vehicle for addressing the "other tax" question in any event because that issue would not resolve the case. Respondent also asserted below that Alabama's sales and use taxes violate the 4-R Act because the exemption granted to interstate water carriers – who do not pay the motor fuel excise tax either, see Opp. 5 & n.3 – is discriminatory within the meaning of § 11501(b)(4). The district court did not agree, Pet. App. 62a-66a, but the court of appeals reversed that ruling and held that "no one can seriously dispute that the [interstate] water carriers, who pay not a cent of tax on diesel fuel, are the beneficiaries of a discriminatory tax regime." Pet. App. 17a.

The court of appeals' holding that the challenged tax is discriminatory because of the exemption for interstate water carriers is an independent ground for its determination that the tax is unlawful. And this holding would not be affected by a ruling of this Court on the "other tax" question because interstate water carriers do not pay any "other tax" on their diesel fuel. Accordingly, the court of appeals' invalidation of Alabama's sales and use taxes would stand regardless of this Court's resolution of the additional question that the Government proposes. This Court therefore should not devote its scarce resources to resolving a non-dispositive question in this case.

CONCLUSION

For the foregoing reasons, and those presented in the opposition to the petition, this Court should deny the petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. 11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales and use tax but grants exemptions from the tax to the railroads' competitors.

2. Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

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In the Supreme Court of the United States

No. 13-553

ALABAMA DEPARTMENT OF REVENUE, ET AL., PETITIONERS

v.

CSX TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case concerns Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (49 U.S.C. 11501), which bars States and their subdivisions from imposing discriminatory taxes on rail carriers. The Department of Transportation is charged with, *inter alia*, overseeing rail safety, 49 U.S.C. 20103, and administering various railroad financial-assistance programs. The Surface Transportation Board (STB)—an independent federal agency with responsibility for the economic regulation of the Nation's railroads, 49 U.S.C. 721—is charged with fostering economic conditions that allow rail carriers to earn adequate revenues. At the invitation of the Court, the United States

filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Facing the physical and economic decline of the domestic rail industry, Congress enacted the 4-R Act to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." § 101(a), 90 Stat. 33; see *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1105 (2011) (*CSX*); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Section 306 of the 4-R Act targets discriminatory state taxation as a particular cause of the rail industry's difficulties. See § 306, 90 Stat. 54; H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975); see also *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 12 (2007) (*Georgia State Bd.*).[1] After long study, Congress found that certain forms of state taxation of rail carriers "unreasonably burden and discriminate

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[1] Section 306 has been repeatedly recodified and rephrased without substantive change. See *CSX*, 131 S. Ct. at 1105 n.1. It was originally codified at 49 U.S.C. 26c (1976). In 1978, as part of the enactment into positive law of Title 49, it was recodified with slight alterations at 49 U.S.C. 11503 (1994). See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1445-1446. Those alterations "may not be construed as making a substantive change in the laws replaced." § 3(a), 92 Stat. 1466; see *Burlington N. R.R.*, 481 U.S. at 457 n.1. In 1995, as part of a general amendment of Subtitle IV of Title 49 that abolished the Interstate Commerce Commission (ICC) and created the STB, the provisions of Section 11503 were again reenacted without substantive change but were renumbered as Section 11501. ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 843-844. This brief generally refers to the current codification of Section 306 at 49 U.S.C. 11501.

against interstate commerce." 49 U.S.C. 11501(b). To protect those important channels of commerce, Congress authorized federal courts to enjoin prohibited forms of state taxation. 49 U.S.C. 11501(c); see *CSX*, 131 S. Ct. at 1105.

Section 11501(b) identifies the types of taxation that are prohibited. Subsections (b)(1)-(3) bar States from making disproportionately high assessments of, or imposing higher ad valorem tax rates upon, rail transportation property relative to "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3); see 49 U.S.C. 11501(a)(4) (defining "commercial and industrial property" as "property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy"). Where they apply, Subsections (b)(1)-(3) establish per se prohibitions based on explicit objective criteria. See *Georgia State Bd.*, 552 U.S. at 16, 18; *Burlington N. R.R.*, 481 U.S. at 461 (rejecting as "untenable" the view that a claim under Subsection (b)(1) requires proof of intentional discrimination).

A separate catch-all provision, 49 U.S.C. 11501(b)(4), broadly prohibits States and their subdivisions from "[i]mpos[ing] another tax that discriminates against a rail carrier."[2] That is the provision at issue here.

2. Alabama imposes four-percent sales tax and use tax on the retail sale, storage, use, or consumption in

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[2] That language dates from the 1978 recodification. See 92 Stat. 1446. As originally enacted, the 4-R Act forbade "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." 90 Stat. 54; see *CSX*, 131 S. Ct. at 1107 n.6 (deeming "another tax" and "any other tax" to be "synonymous").

Alabama of tangible personal property, including motor fuel. Ala. Code § 40-23-2(1) (sales tax); *id.* § 40-23-61(a) (use tax).[3] Although the sales tax and use tax are generally applicable, state law exempts fuel used by vessels engaged in interstate or foreign commerce. *Id.* § 40-23-4(a)(10) (exemption from sales tax); *id.* § 40-23-62(12) (exemption from use tax). Water carriers engaged in such commerce therefore typically do not pay tax to Alabama on their motor fuel. Pet. App. 3a, 62a-63a.

Alabama also imposes primary and additional excise taxes on the receipt of motor fuel, including excise taxes totaling "[n]ineteen cents per gallon on diesel fuel." Ala. Code § 40-17-325(a)(2).[4] Motor fuel subject to those taxes is exempt from "any other excise tax," *id.* § 40-17-325(b), a category that includes sales and use tax. On-road motor carriers therefore typically pay motor-fuel excise taxes of 19 cents per gallon of fuel to Alabama and do not pay the four-percent sales or use tax on their fuel.

Fuel used in railroad locomotives is generally not subject to Alabama's motor-fuel excise taxes. That is because dyed diesel fuel—which is what locomotives

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[3] Alabama's sales tax and use tax are both four percent, but property subject to the former is not also subject to the latter. Ala. Code. § 40-23-62(1); see *Ex parte Fleming Foods of Ala., Inc.*, 648 So. 2d 577, 579 (Ala. 1994) (describing the taxes as "complementary"), cert. denied, 514 U.S. 1063 (1995).

[4] At the time of the district court's decision in this case, the motor-fuel excise taxes were codified at Ala. Code §§ 40-17-2 and 40-17-220. See Pet. App. 38a-39a & nn.6-7. In October 2012, Alabama enacted the Alabama Terminal Excise Tax Act, No. 2011-565, § 45, 2011 Ala. Laws Reg. Sess. 1141-1142, which modified the motor-fuel tax scheme. The modifications are not material here. See Pet. App. 3a n.2.

burn—is exempt from those taxes. Ala. Code § 40-17-329(a)(3). Railroads therefore typically pay sales and use tax of four percent to the State on their fuel and do not pay motor-fuel excise taxes.[5]

3. Respondent, a rail carrier providing transportation subject to the jurisdiction of the STB, sued petitioners Alabama Department of Revenue and its Commissioner in federal district court under the 4-R Act. Respondent contended that, by requiring rail carriers to pay sales and use tax from which motor carriers and interstate water carriers are exempt, petitioners had discriminated against respondent in violation of 49 U.S.C. 11501(b)(4).

a. The district court dismissed respondent's suit, and the court of appeals affirmed. 350 Fed. Appx. 318. Both courts relied on an earlier Eleventh Circuit decision holding that rail carriers could not invoke Section 11501(b)(4) to challenge a generally applicable tax on the ground that other entities were exempt from the tax. *Id.* at 319-320; see *Norfolk S. Ry.* v. *Alabama Dep't of Revenue*, 550 F.3d 1306, 1316 (11th Cir. 2008).

b. This Court granted respondent's petition for a writ of certiorari, limited to the following question: "Whether a State's exemptions of rail carrier competitors, but not rail carriers, from generally applicable

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[5] The foregoing describes only the state-level tax scheme. Certain subdivisions of Alabama are also authorized to levy and collect taxes. See, *e.g.*, Ala. Code §§ 11-3-11(a)(2), 11-3-11.2, 11-51-200. Pursuant to that authority, several Alabama counties and municipalities impose additional sales and use tax on dyed diesel fuel, see Pet. App. 35a-36a, as well as additional excise taxes on undyed diesel fuel, see *id.* at 57a. In addition, federal motor-fuel taxes are collected on on-road diesel fuel, but not on off-road dyed diesel such as that used by railroads. See 26 U.S.C. 4081, 4082; 26 C.F.R. 48.4082-1.

sales and use taxes on fuel subject the taxes to challenge under 49 U.S.C. § 11501(b)(4) as 'another tax that discriminates against a rail carrier.'" 560 U.S. 964. After briefing and argument, the Court answered that threshold question in the affirmative. *CSX*, 131 S. Ct. at 1114.

i. The Court held that the term "another tax" in Section 11501(b)(4) refers to "any form of tax a State might impose, on any asset or transaction, except the taxes on property previously addressed in subsections (b)(1)-(3)." *CSX*, 131 S. Ct. at 1107. Accordingly, "[a]n excise tax, like Alabama's sales and use tax, is 'another tax' under subsection (b)(4)." *Ibid.* The Court further held that "'[d]iscrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored,'" *id.* at 1108 (quoting *Black's Law Dictionary* 534 (9th ed. 2009)), and that a tax with an exemption "discriminates" if the exempt and non-exempt "groups are similarly situated and there is no justification for the difference in treatment," *id.* at 1109. In so holding, the Court declined to "limit the prohibited discrimination to state tax schemes that unjustifiably exempt local actors, as opposed to interstate entities" because, "[c]onsistent with the Act's purpose of restoring the financial stability of railroads (not of interstate carriers generally)," the 4-R Act distinguishes "between railroads and other actors, whether interstate or local." *Ibid.*

The Court declined to "consider any issues concerning whether [the challenged Alabama] exemptions actually discriminate against" respondent. *CSX*, 131 S. Ct. at 1107 n.5; see *id.* at 1109 n.8, 1114. In particular, the Court declined to decide (i) whether a "court

must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well," and (ii) whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." *Id.* at 1107 n.5. The Court left those issues "to the trial court." *Ibid.*; see *id.* at 1110 n.8 ("Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers.").

ii. Justice Thomas, joined by Justice Ginsburg, dissented. *CSX*, 131 S. Ct. at 1114-1120. The dissenting Justices agreed with the Court's resolution of the threshold question. They would have further held, however, that "a tax exemption scheme" violates Section 11501(b)(4) only if it "target[s] or single[s] out railroads by comparison to general commercial and industrial taxpayers." *Id.* at 1115.

4. On remand, the district court held a bench trial and ultimately found "no discrimination under the 4-R Act." Pet. App. 66a; see *id.* at 30a-65a. The court defined the appropriate comparison class as the rail carrier's "competing transportation modes" (*i.e.*, motor carriers and interstate water carriers), after noting that "both parties" had "agree[d]" that the "'competing mode' comparison is appropriate." *Id.* at 44a-45a; see *id.* at 51a. The court then examined "whether [petitioners] adequately justifie[d] the sales and use tax exemptions for [the] rail carrier's principal competitors." *Id.* at 54a.

The State had pointed to the "separate tax on the fuel used by motor carriers" to "justify the sales and use tax 'exemption' provided to motor carriers." Pet.

App. 55a-56a. The district court found that "justification sufficient" because "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 56a; see *id.* at 50a-51a, 54a. The court explained that "motor carriers actually pay a higher rate" of state tax on such fuel and that, "when factoring [in] the local (city and county) sales and use taxes imposed on rail carriers'[] diesel fuel," rail carriers and motor carriers "paid similar rates per gallon of diesel fuel from January 2007 through December 2009." *Id.* at 56a-57a. The court further noted that "these calculations fail to account for the local excise taxes imposed on motor carriers per gallon purchased of undyed diesel fuel." *Id.* at 57a.

With respect to the claim of disparate treatment as compared to interstate water carriers, the district court found no "discriminat[ion]" for "two reasons." Pet. App. 63a. First, respondent had offered "no evidence regarding the purported discriminatory effect as it relates to" interstate (as opposed to intrastate) water carriers. *Id.* at 64a. Second, the possibility that an exemption for water carriers may have been needed to avoid "commerce clause scrutiny" meant that rail carriers are not "the same in all relevant respects." *Ibid.*

5. The court of appeals reversed and remanded. Pet. App. 1a-17a.

a. The court of appeals began by addressing a "first-order question that [this] Court left untouched" in *CSX*: "against what do we compare the railroads?" Pet. App. 7a. The court noted that "the question of the proper comparison class ha[d] not been the central inquiry of this appeal," and that "the district court and

the parties [had] adopted the competitive approach" in the proceedings below. *Id.* at 8a; see *id.* at 11a. The court of appeals nevertheless felt "obliged to say a few words" about the matter. *Id.* at 8a. It ultimately concluded that, "in the context of a state's sales tax on diesel fuel," the "competitive model best serves" the 4-R Act's "goal" of "ensuring 'financial stability' for rail carriers." *Id.* at 11a; see *id.* at 11a n.3 (explaining that different comparison class "fails to address discriminatory taxes that place rail carriers at a significant disadvantage vis-à-vis their competitors"). In so ruling, the court observed that "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case," *id.* at 12a n.4 (internal quotation marks omitted), and that a comparison class of "all commercial and industrial taxpayers" may "be appropriate in certain situations," *id.* at 11a n.3.

The court of appeals further held that the challenged tax was discriminatory. Pet. App. 12a-17a. The court stated that respondent had "established a prima facie case of discrimination" because its "competitors do not pay the State's sales [and use] tax." *Id.* at 12a; see *id.* at 2a n.1. Turning to petitioners' justification for the disparate treatment, the court declined to examine "all the taxes paid on diesel-fuel purchases" and instead "look[ed] only at the sales and use tax with respect to fuel to see if discrimination has occurred." *Id.* at 12a-13a (internal quotation marks omitted). The court stated that a broader inquiry would impose the "Sisyphean burden of evaluating the fairness of the State's overall tax structure." *Id.* at 16a; see *id.* at 13a.

b. Judge Cox dissented. Pet. App. 18a-29a. He "agree[d] that the appropriate comparison class consists of the stipulated competitors." *Id.* at 18a. He disagreed, however, with the majority's conclusion "that a tax exemption for interstate motor carriers discriminates against interstate rail carriers when motor carriers in fact carry a similar or heavier tax burden for purchase of the same commodity." *Ibid.*; see *id.* at 25a (characterizing as "bizarre" the holding that a rail carrier suffers discrimination from a tax that puts it "at no discernable disadvantage").

SUMMARY OF ARGUMENT

This case now presents the two issues arising from 49 U.S.C. 11501(b)(4) that this Court left open in *CSX Transporation, Inc.* v. *Alabama Department of Revenue*, 131 S. Ct. 1101 (2011): whether a court may "compare the taxation of [respondent]" to the taxation of its "direct competitors" without including "other commercial entities" in the comparison class, and whether a "court must consider not only the specific taxes challenged, but also the broader tax scheme." *Id.* at 1107 n.5. The Court should answer both questions in the affirmative.

A. As the court of appeals correctly held, the appropriate comparison class in a Section 11501(b)(4) suit may vary depending on the type of discrimination that a railroad alleges, and a comparison class of competitors was appropriate in this case. Section 11501(b)(4) forbids States and localities from imposing a tax that "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). Under that provision, a tax "discriminates" if it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation

marks omitted). For purposes of that analysis, the identity of the allegedly "favored" group may shift depending on the nature of the tax scheme in question. That reading is reinforced by the structure of Section 11501(b), which includes a specific comparison class in Subsections (b)(1)-(3) but not in Subsection (4), and by an examination of Congress's purposes in enacting the anti-discrimination provision. Here, because the alleged discrimination was the exemption of motor carriers and interstate water carriers from a sales and use tax to which railroads are subject, the court of appeals correctly approved a comparison class of respondent's competitors.

B. The court of appeals erred in restricting its analysis to the challenged sales and use tax and refusing to consider the State's alternative and comparable motor-fuel taxes on diesel fuel. Under Section 11501(b)(4), a State can justify differential treatment of railroads with respect to a particular tax by showing that the comparison class is subject to alternative and comparable state taxes that are not levied against railroads. That conclusion is dictated by the text of the anti-discrimination provision, especially as read against the backdrop of the complementary-tax doctrine that applies in other areas of federal tax-discrimination law, and it avoids "bizarre" results (Pet. App. 25a (Cox, J., dissenting)). Contrary to the court of appeals' ruling (*id.* at 13a), any expense or difficulty associated with examination of an alternative tax is not a basis for declaring that examination outside the competence of the courts. See *CSX*, 131 S. Ct. at 1114.

C. In the government's view, the appropriate disposition in this case is a remand. As to the claim that the State discriminates against respondent in favor of motor carriers, the court of appeals' finding of discrimination

omitted an important aspect of the Section 11501(b)(4) analysis. That court should have the opportunity to consider, in the first instance, the significance of the motor-fuel taxes as a justification for differential treatment of railroads and motor carriers under the sales and use tax. And while resolution of respondent's claim of discrimination vis-à-vis interstate water carriers does not turn on the existence of an alternative and comparable state tax, the court of appeals failed to evaluate the reasons the district court gave for rejecting the claim, and a remand for fuller consideration is therefore appropriate.

ARGUMENT

A. Under Section 11501(b)(4), The Appropriate Comparison Class May Vary Depending On The Type Of Discrimination That A Railroad Alleges

In *CSX Transportation, Inc.* v. *Alabama Department of Revenue*, 131 S. Ct. 1101 (2011), this Court declined to resolve whether, in adjudicating a claim of unlawful discrimination under Section 11501(b)(4), a "court must compare the taxation of [respondent] not merely to direct competitors but to other commercial entities as well." *Id.* at 1107 n.5. In the remand proceedings, the court of appeals held that the comparison class may vary depending on the type of discrimination alleged, and that a comparison class consisting of respondent's direct competitors was appropriate in this case. Pet. App. 7a-12a. That holding was correct. Treating commercial and industrial taxpayers as the only possible comparison class for determining whether a state tax violates Section 11501(b)(4), as petitioners urge (Pet. Br. 21-44), would be inconsistent with the statute's text and structure and would not fully effectuate Congress's purposes.

1. Section 11501(b)(4) bars States and localities from imposing any tax that "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). A tax "discriminates" when it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted); see *ibid.* ("To charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter.").

The identity of the group that is alleged to be more "favored" than a railroad may differ depending on the tax scheme at issue. A tax that "targets or singles out railroads as compared to other commercial and industrial taxpayers" is indisputably a form of discrimination under Section 11501(b)(4). *CSX*, 131 S. Ct. at 1115 (Thomas, J., dissenting); see, *e.g.*, *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). But a tax may also "discriminate[] against a rail carrier" if it applies generally to commercial and industrial taxpayers (including railroads), but not to railroads' direct competitors. See Pet. App. 7a-12a. If railroads and their competitors are "similarly situated" and "there is no justification for the difference in treatment," a court cannot "say that such a tax" does not "discriminate" without "adopt[ing] a definition of [discrimination] at odds with its natural meaning." *CSX*, 131 S. Ct. at 1109.

Under this Court's decisions applying analogous anti-discrimination rules, claims of unlawful tax discrimination need not always be premised on a comparison between the plaintiff and a broad class of similarly situated entities. See, *e.g.*, *Arkansas Writers' Pro-*

ject, Inc. v. *Ragland*, 481 U.S. 221, 227-228 (1987) (explaining that "a discriminatory tax on the press burdens rights protected by the First Amendment," and noting that such "discrimination" can take several "distinct forms"). In *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), for example, the Court found that a state income tax on benefits paid to retired federal employees violated a federal statutory prohibition against taxes that "discriminate against the [federal] officer or employee because of the source of the pay or compensation." *Id.* at 808 (quoting 4 U.S.C. 111). In reaching that conclusion, the Court did not suggest that retired federal employees were treated less favorably than the bulk of retirees in Michigan. See *id.* at 805, 814. Rather, the Court compared the treatment of retired federal employees (who were taxed) to the treatment of similarly situated "retired state employees" (who were exempt) and found discrimination on that basis. See *ibid.*; see also *Bacchus Imps., Ltd.* v. *Dias*, 468 U.S. 263, 268-269 (1984) (holding that a generally applicable state excise tax on alcohol unconstitutionally "discriminate[d]" against interstate commerce because certain locally produced beverages were exempted).

Nothing in the 4-R Act suggests that the word "discriminates" in Section 11501(b)(4) imposes any greater limitation on the range of potentially appropriate comparison classes. To the contrary, the structure of the 4-R Act's anti-discrimination provision reinforces the absence of any such limitation. Subsections (b)(1)-(3) of 49 U.S.C. 11501 identify one (and only one) comparison class: "other commercial and industrial property." 49 U.S.C. 11501(b)(1)-(3). Subsection (b)(4), by contrast, does not specify any com-

parison class; it broadly prohibits state and local taxes that "discriminate[] against a rail carrier." 49 U.S.C. 11501(b)(4); see *CSX*, 131 S. Ct. at 1114 (noting that Section 11501(b)(4) does not contain "any of the prior subsections' limitations"). That Congress included a specific comparison class for Subsections (b)(1)-(3) but not for Subsection (b)(4) indicates that the omission was intentional. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 19 (2007) (explaining that, "[i]f Congress had wanted to impose" a particular "limit" in Section 11501, "it surely could have done so").[6]

The omission of a specific comparison class is also consistent with Congress's purposes in enacting the 4-R Act. Congress recognized that railroads "are easy prey for State and local tax assessors" because they are "'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *CSX*, 131 S. Ct. at 1117 (Thomas, J., dissenting) (citation omitted). "[L]inking the taxation of railroads to the taxation of businesses with local political influence" addresses that concern. *Ibid.* Congress also sought, however, to "restor[e] the financial stability of railroads (not of interstate carriers generally)," *id.* at 1109; see § 101(a), 90 Stat. 33; 45

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[6] That does not mean that discrimination under Section 11501(b)(4) occurs whenever any person is treated more favorably for state-tax purposes than is a rail carrier. If "a railroad challenged a scheme in which 'every person and business in the State of Alabama paid a $1 annual tax, and *one person* was exempt,' * * * for some reason having nothing to do with railroads," the suit "would be promptly dismissed." *CSX*, 131 S. Ct. at 1110 n.8 (quoting *id.* at 1119 (Thomas, J., dissenting)).

U.S.C. 801(a), and to "foster competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33; see 45 U.S.C. 801(b)(2); see also *CSX*, 131 S. Ct. at 1109 (stating that the "distinctions drawn in § 11501(b) are * * * between railroads and other actors, whether interstate or local"). Linking the taxation of railroads to the taxation of other carriers and modes of transportation furthers that additional purpose.

2. In contending that commercial and industrial taxpayers are the only permissible comparison class in a Section 11501(b)(4) case, petitioners have argued (Pet. Br. 22-44) that the comparison class set forth in the preceding subsections applies under Section 11501(b)(4) as well; that a flexible approach to the comparison class deprives the word "discriminates" of any consistent meaning; that permitting use of different comparison classes in different Section 11501(b)(4) cases will make the law unpredictable and difficult to administer; and that the history of the 4-R Act supports a comparison class of local, rather than interstate, actors. Those arguments lack merit.

a. Since Congress conspicuously omitted any mention of a comparison class in Subsection (b)(4), it cannot have expected courts to borrow directly from Subsections (b)(1)-(3). See *Russello*, 464 U.S. at 23. The comparison class specified in those earlier subsections consists not of commercial and industrial *taxpayers* but of "commercial and industrial *property*," 49 U.S.C. 11501(b)(1)-(3) (emphasis added), and Subsection (b)(4) covers taxes *other than* property taxes. *CSX*, 131 S. Ct. at 1107. In drafting Section 11501(b), Congress drew a "sharp line between property taxes and other taxes," creating "an asymmetical statute" in

which a principle like "*ejusdem generis* is not relevant." *Id.* at 1113-1114. The comparison class in Subsections (b)(1)-(3) is also limited to commercial and industrial property that is actually taxed by the State, see 49 U.S.C. 11501(a)(4); *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 341-342 (1994), while Subsection (b)(4) permits a finding of discrimination based on exemptions from taxation, see *CSX*, 131 S. Ct. at 1105, 1107-1108; see also *id.* at 1114-1115 (Thomas, J., dissenting). It therefore makes little sense to carry into the "very different terrain" of Subsection (b)(4) the exact comparison class named in the preceding subsections. *CSX*, 131 S. Ct. at 1110 n.8.

Contrary to petitioners' argument (Pet. Br. 23-24, 27-29), the opening clause of Section 11501(b), which echoes some (but not all) of the language of the Interstate Commerce Act (49 U.S.C. 13(4) (1976)), does not require a comparison between the treatment of railroads and the treatment of "local businesses." That opening clause reflects Congress's apparent view that the prohibited forms of discrimination "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. 11501(b). Congress could reasonably conclude that a state tax giving a competitive advantage to one form of interstate transport over another will burden interstate commerce.

In any event, the text of the operative prohibition requires the court to determine, not whether the challenged Alabama tax discriminates against interstate commerce as such, but whether it "discriminates against a rail carrier." 49 U.S.C. 11501(b)(4). A state tax that subjected interstate motor carriers to uniquely onerous treatment, for example, might well burden

or discriminate against interstate commerce, but it would not violate the 4-R Act. As the Court in *CSX* explained, "[t]he distinctions drawn in § 11501(b) are not between interstate and local actors, as the State contends, but rather between railroads and other actors, whether interstate or local." 131 S. Ct. at 1109.

b. Petitioners are also wrong in arguing (Pet. Br. 29-30) that the court of appeals' holding deprives the word "discriminates" of consistent meaning. Under Section 11501(b)(4), a state tax "discriminates" if it fails "to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted). Because Section 11501(b)(4) bars only state taxes that "discriminate[] against a rail carrier," the plaintiff in a 4-R Act suit will always allege that railroads have been unreasonably disfavored vis-à-vis some other class of taxpayers. The fact that many classes of "favored" taxpayers are imaginable simply means that the term "discriminates" is capacious, not that it is inconstant. See *id.* at 1112 (explaining that "the very purpose of a catch-all provision like subsection (b)(4) is to avoid the necessity of listing each matter (here, each kind of tax discrimination) falling within it"); *id.* at 1113 ("[I]n the context of the 4-R Act, th[e] word [discriminates] has, and has always had, just one meaning.").

c. The Court need not adopt a fixed comparison class (let alone the particular class that petitioners urge) to render the 4-R Act administrable. See Pet. Br. 38-43. In Section 11501(b)(4) litigation, a court does not simply select the comparison class it prefers. Rather, the plaintiff, who is "master of the complaint,"

Caterpillar Inc. v. *Williams*, 482 U.S. 386, 398-399 (1987), makes a factual allegation of discrimination, based on the nature of the state tax at issue and the identity of the group that is claimed to receive more favorable treatment, cf. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (referring to "discrimination" under ADEA as "ultimate question[] of fact") (internal quotation marks omitted); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 293 (1982) (holding that discrimination under Section 703(h) of Title VII "is a factual matter"). The court then decides whether the comparison class alleged is similarly situated to the plaintiff and otherwise appropriate to the circumstances—and either a broad class (commercial and industrial taxpayers) or a narrow class (competitors) may qualify in a given case. Compare, *e.g.*, *Kansas City S. Ry.* v. *Koeller*, 653 F.3d 496, 500, 508-510 (7th Cir.), cert. denied, 132 S. Ct. 855 (2011), with *Burlington N., Santa Fe Ry.* v. *Lohman*, 193 F.3d 984, 985-986 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000); cf. Samuel Eckman, Comment, *A State-Centered Approach to Tax Discrimination Under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051, 1082-1083 (2012). Several courts in Section 11501(b)(4) cases have embraced that flexible approach. See, *e.g.*, *Lohman*, 193 F.3d at 985-986; *Burlington N. R.R.* v. *Commissioner of Revenue*, 509 N.W.2d 551, 553 (Minn. 1993); cf. *Koeller*, 653 F.3d at 508-510.

d. Finally, the legislative history on which petitioners rely (Pet. Br. 30-35) does not support their reading of Section 11501(b)(4). History relating to Section 11501(b)(4) itself is quite sparse, because language similar to that provision did not appear until near the end of the lengthy process that produced the

4-R Act. See *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981); H.R. 12891, 93rd Cong., 2d Sess 22 (Mar. 26, 1974) (generally prohibiting discrimination against common carriers). Much of the history on which petitioners rely—which consists mainly of testimony at hearings, and often generally refers to the treatment of "other taxpayers" without specifying which ones (*e.g.*, Pet. Br. 31-32)—dates from before any language analogous to the text of Section 11501(b)(4) was under consideration by Congress. All of that history, moreover, dates from a period when Congress was still considering including common carriers other than railroads within the scope of the prohibition on discrimination. See, *e.g.*, 121 Cong. Rec. 41,888, 41,894, 41,926 (Dec. 19, 1975) (quoting Conference Report on S. 2718); *Railroads—1975: Hearings Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1178 (1975) (statement of American Trucking Associations favoring provision "prohibit[ing] discriminatory taxation * * * of the property of any carrier or freight forwarder") (cited in Pet. Br. 34). That history therefore does not indicate that the provision as enacted forbids a comparison between railroads and their competitors.

3. Here, the gravamen of respondent's challenge is that purchases of diesel fuel by interstate motor carriers and interstate water carriers are exempt from a generally applicable sales and use tax that railroads must pay when they purchase comparable fuel. See Pet. App. 20a (Cox, J., dissenting) (citing J.A. 28).[7] As we explain below, the court of appeals

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[7] Section 11501(b)(4) cases involving alleged discrimination by means of exemptions naturally lend themselves to a comparison

erred in disregarding the fact that interstate motor carriers (but not railroads) must pay a different Alabama tax when they purchase diesel fuel. But if motor carriers' purchases of diesel fuel were altogether exempt from Alabama tax, the fact that railroads are treated the same as the mine run of Alabama taxpayers would not save the scheme from invalidation under the 4-R Act. Indeed, at various points in this litigation, petitioners appeared to accept that railroads' competitors constituted a proper comparison class for purposes of the Section 11501(b)(4) analysis. See Pet. App. 8a, 11a; U.S. Petition-stage Amicus Br. 19-21. The court of appeals therefore was correct to approve that comparison class in this case.

B. A State Can Justify A Challenged Tax's Differential Treatment of Railroads By Pointing To An Alternative And Comparable Tax That Applies To The Comparison Class But Not To Railroads

In remanding this case, the Court in *CSX* explained that "[w]hether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers." 131 S. Ct. at 1110 n.8. Here, petitioners' justification for exempting motor carriers from Alabama's sales and use tax on diesel fuel is that such carriers already pay different (and higher) state excise taxes on diesel fuel, *i.e.*, motor-fuel taxes from which railroads are exempt. The court of appeals

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class of railroad competitors, since exemptions are more readily used to remove a small class from an otherwise generally applicable tax than to exclude almost everyone from the scope of the tax at the outset. Cf. *CSX*, 131 S. Ct. at 1109.

rejected that justification as a matter of law, refusing to consider any "taxes paid on diesel-fuel purchases" other than "the sales and use tax with respect to fuel." Pet. App. 12a-13a (internal quotation marks omitted). That ruling was erroneous. Under Section 11501(b)(4), one way a State can justify differential treatment of railroads with respect to a particular tax is to show that the comparison class is subject to alternative and comparable state taxes that are not levied against railroads.

1. a. As discussed above, the term "discriminates" calls for an inquiry into whether a "failure to treat all persons equally" is justified by some "reasonable distinction * * * between those favored and those not favored." *CSX*, 131 S. Ct. at 1108 (internal quotation marks omitted). A "reasonable distinction" can be based on the different actions or characteristics of the favored and disfavored groups. See *ibid.* (noting that whether "the groups are the same in all relevant respects" is pertinent); *id.* at 1109 & n.8 (explaining that a State does not violate Section 11501(b)(4) if it subjects railroads to a tax and exempts one person from that tax "for some reason having nothing to do with railroads"). Such a distinction can also be based on the different treatment of those groups under other provisions of state tax law. If a motor carrier pays motor-fuel taxes for each gallon of diesel fuel and a rail carrier does not, that may be a reasonable basis for subjecting the rail carrier to sales and use tax on each gallon of diesel fuel but exempting the motor carrier from that tax. Depending on the amounts of those separate taxes and how they are imposed, the result of that scheme may be equality of treatment rather than "discriminat[ion]." 49 U.S.C. 11501(b)(4).

To be sure, Section 11501(b)(4) speaks "in the singular about 'another tax,'" Pet. App. 13a, and a State does not violate the provision unless the challenged tax itself "discriminates," 49 U.S.C. 11501(b)(4). But a court cannot determine whether prohibited discrimination exists without considering how the various parties are situated in relation to the taxable item and to each other. Section 11501(b)(4) does not require the court conducting that inquiry to disregard a comparable tax on the relevant item simply because that tax is found in a different portion of a State's code, or is given a different name or label, than the allegedly discriminatory tax. Cf. *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U.S. 217, 227 (1908) (focusing on the "nature and effect" of a state tax rather than its "name" or "form of words").

The original version of the prohibition found in Section 11501(b)(4)—to which the current text must be construed as "substantive[ly]" identical, § 3(a), 92 Stat. 1466; see *CSX*, 131 S. Ct. at 1107 n.6; *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987)—reinforces that conclusion. The 1976 enactment barred "[t]he imposition of any other tax which *results in discriminatory treatment* of a common carrier by railroad." 90 Stat. 54 (emphasis added). That language suggests a congressional focus on whether the railroad ultimately suffers a practical "disadvantage" from the tax, Pet. App. 25a (Cox, J., dissenting), and not merely on how the railroad fares within the four corners of the challenged tax provision.

b. That conclusion is also bolstered by the "complementary tax" doctrine that applies in other areas of federal tax-discrimination law. In various contexts

where discriminatory state taxation is forbidden, this Court has long held that differential treatment under a particular state tax law can be justified by the existence of a complementary tax that levels the playing field.

That doctrine has been a consistent feature of this Court's dormant Commerce Clause jurisprudence for more than a century. See 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.14[3][c], at 4-111 to 4-112 (3d ed. 2000). In *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472 (1932), for example, the Court considered whether a tax on gasoline "intended to be stored or used for consumption" in South Carolina after being shipped into the State amounted to "discrimination against interstate commerce." *Id.* at 474, 479. Emphasizing that "[d]iscrimination * * * is a practical conception," the Court held that the existence of a separate state tax on gasoline use and consumption, which ensured that all entities using gasoline "in their business enterprises[] pay the same amount on the gasoline," justified the differential treatment of out-of-state gasoline under the challenged tax. *Id.* at 481. The plaintiff in *Gregg Dyeing* contended that there was no "right to invoke other statutes" taxing gasoline "to support the validity of the [a]ct assailed." *Id.* at 479. In rejecting that argument, the Court explained that the constitutionality of a State's taxing scheme "is not to be determined by artificial standards. * * * There is no demand in th[e] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit." *Id.* at 480.

Similarly in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), the Court held that a use tax that

applied only to goods purchased outside Washington did not discriminate against interstate commerce because goods purchased in the State were subject to a sales tax and the two taxes imposed equivalent burdens. The Court explained that "[f]or the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another." *Id.* at 584. Taking both provisions into account, the Court concluded, "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Ibid.*; see *id.* at 585-586.[8]

The law in cases involving state-tax discrimination against the federal government has long been to the same effect. Thus, in *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376 (1960), the Court observed that its determination whether a particular Texas tax provision "discriminate[d] against the Government or those with whom it deals" could not "rest merely on an examination of that article [of the Texas code]. It does not operate in a vacuum." *Id.* at 383, 387. Rather, the Court explained, "it is necessary to determine how other taxpayers similarly situated are treated" under the "tax structure of the state." *Id.* at 383 (internal quotation marks omitted); see, *e.g.*, *Washington* v. *United States*, 460 U.S. 536, 542, 544-546 (1983) (explaining that, in assessing

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[8] See also, *e.g.*, *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 102-103 (1994); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69-70 (1963); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204-205 (1961); *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 249-252 (1928).

whether a state tax discriminates against the federal government, "[t]he entire trend of [the Court's] decisions" since the 1930s "has been to avoid wooden formalism") (internal quotation marks omitted); see also, *e.g.*, *Mackay Tele. & Cable Co.* v. *City of Little Rock*, 250 U.S. 94, 100 (1919) (examining tax other than challenged tax in ruling on equal-protection claim).

Read against that backdrop, the word "discriminates" in Section 11501(b)(4) is naturally understood to require a court to consider the contention that the comparison class is subject to a tax that is comparable to the challenged tax and falls on the same taxable item. Nothing in the 4-R Act indicates that Congress intended the inquiry under Section 11501(b)(4) to be more truncated and formalistic than the inquiry carried out in other areas where federal law bars States from imposing discriminatory taxes. Cf. *CSX*, 131 S. Ct. at 1109.[9] When Congress prohibited any state tax

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[9] *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979), is not to the contrary. In *Snead*, the Court analyzed 15 U.S.C. 391, which forbids a State from imposing "a tax on or with respect to the generation or transmission of electricity which discriminates" against out-of-state producers or consumers. The Court refused to incorporate a general gross-receipts tax into its discrimination analysis, explaining that "the federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State." 441 U.S. at 149. Section 11501(b)(4) contains no analogous limiting language. And even if it did, the alternative taxes on which petitioners rely in this case would still qualify for consideration because (unlike the general gross-receipts tax invoked by the State in *Snead*) those taxes apply only to motor fuel. In addition, the Court in *Snead* identified clear evidence that Congress had enacted 15 U.S.C. 391 specifically to invalidate the particular state tax before the Court, see 441 U.S. at 149-150, and that rationale has no application here. See, *e.g.*, *Burlington N.*

that "discriminates against a rail carrier," it was presumably aware of this Court's Commerce Clause precedents, see 49 U.S.C. 11501(b) (explaining that conduct proscribed by the 4-R Act "unreasonably burden[s] and discriminate[s] against interstate commerce"); S. Rep. No. 445, 87th Cong., 1st Sess. 445-448 (1961); cf. *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010), and did not reject the established, "judicially defined concept" they reflect, *Davis*, 489 U.S. at 813.

c. The court of appeals' contrary approach gives rise to "bizarre" results that are inconsistent with the purposes of the anti-discrimination provision. Pet. App. 25a (Cox, J., dissenting).

Refusing to take account of any tax other than the allegedly discriminatory tax could make railroads "most-favored taxpayers," *CSX*, 131 S. Ct. at 1109 n.8, turning Section 11501(b)(4) from a shield against discrimination into a sword by which to obtain a business advantage. If the Alabama sales and use tax paid by rail carriers on diesel fuel is equivalent to (or less than) the state motor-fuel taxes paid by motor carriers on diesel fuel, then a railroad suffers no "discernible disadvantage." Pet. App. 25a (Cox, J., dissenting); cf. *North Dakota* v. *United States*, 495 U.S. 423, 439 (1990) (plurality opinion) ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it."). Under respondent's approach, however, a railroad could obtain a 4-R Act injunction against imposition of the sales and use tax on its diesel fuel, see 49 U.S.C. 11501(c), thereby acquiring a competitive advantage over motor carriers.

R.R. v. *City of Superior*, 932 F.2d 1185, 1190 (7th Cir. 1991) (Flaum, J., dissenting in part).

Such a "windfall" goes far beyond the congressional purposes of "restoring the financial stability of railroads," *CSX*, 131 S. Ct. at 1109, 1110 n.8, and "foster[ing] competition among all carriers by railroad and other modes of transportation," § 101(b)(2), 90 Stat. 33; see Pet. App. 25a (Cox, J., dissenting) ("a tax that places rail carriers in the same tax position as their competitors" or "a better one" cannot "threaten railroads' financial stability"); see also *Trailer Train Co.* v. *State Tax Comm'n*, 929 F.2d 1300, 1305 (8th Cir.) (Gibson, J., dissenting), cert. denied, 502 U.S. 856 (1991).

Focusing solely on the challenged tax could also make the outcome of a Section 11501(b)(4) case turn on trivial differences in the structure of different States' tax codes. If a State adopted in separate provisions, and gave separate names to, what is essentially a unitary levy on railroads and motor carriers, it would risk a determination that each provision imposes a separate tax and that the motor-carrier-related provision cannot form part of the State's justification in a Section 11501(b)(4) suit. In contrast, if the State enacted in a single provision an "excise tax" that imposes separate financial responsibilities on railroads and motor carriers, it would maximize its chances of avoiding Section 11501(b)(4) liability. The 4-R Act's application should not turn on such artificial distinctions. Cf. *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 133-134 (1987) (rejecting interpretation of tax-discrimination provision that would "do no more than place a meaningless hurdle before state legislatures seeking to conform their tax scheme to the requirements of [that] provision").

2. In refusing to consider Alabama's motor-fuel taxes, the court of appeals asserted that the "actual fairness" of the State's "arrangements" for taxing diesel fuel was "too difficult and expensive to evaluate." Pet. App. 13a. But this Court recognized in *CSX* that, although "[d]iscrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified," such difficulties are no reason to "flout the congressional command" by "declar[ing] the matter beyond us." 131 S. Ct. at 1114; see *Burlington N. R.R.*, 481 U.S. at 464 (stating that possible burden on courts under Section 11501 could not justify "reconsider[ing]" Congress's judgment). The court of appeals should not have pretermitted the discrimination inquiry here on the ground that examining one alternative state levy on diesel fuel was unduly onerous.

Petitioners did not ask the district court to examine and weigh together *all* of the various tax burdens that state law places on railroads and motor carriers. With regard to the entirety of their operations, railroads and motor carriers—which purchase and own divergent kinds and amounts of property—are in many respects differently situated, see Pet. App. 61a-62a, and a broad comparison between them would "involve[] balancing incommensurate burdens imposed on disparate activities," *Associated Indus.* v. *Lohman*, 511 U.S. 641, 655-656 & n.5 (1994); see *id.* at 649-650; *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 105 (1994) (stating that attempt to compare "taxes on dissimilar events" would "plunge" the courts "into the morass of weighing comparative tax burdens") (internal quotation marks omitted); *McNamara*, 817 F.2d at 377 (refusing to

evaluate the "intrinsic economic fairness of a tax system to a particular taxpayer").

The justification that petitioners advanced in the district court was far more limited in scope. To explain the disparate treatment of motor carriers, petitioners relied solely on a few provisions of Alabama law, separate from the provisions imposing the sales and use tax, that specifically addressed motor-fuel taxation. See Ala. Code § 40-17-325(a)(2); Pet. App. 38a-39a & nn.6-7. Petitioners thus sought to compare the excise-tax burden that railroads shoulder for a gallon of diesel fuel to the excise-tax burden that motor carriers shoulder for the same taxable item. See Pet. App. 55a-58a. That comparison was especially apt because the state-law provisions on which petitioners relied were central to respondent's own claim of unlawful discrimination, since it is the imposition of motor-fuel tax on motor carriers that exempts those carriers from any additional excise tax (including sales and use tax) on the fuel. See Ala. Code § 40-17-325(a)(2), (b); Pet. App. 38a-39a & nn.6-7, 55a.

Deciding whether such an alternative tax is comparable to the challenged tax in nature and amount is a manageable undertaking, not a "Sisyphean burden." Pet. App. 16a; see *Lohman*, 511 U.S. at 655-656 n.5 (stating that a "court that is confined to examining the rates specified in statutes, ordinances, or regulations for taxes assessed on 'substantially equivalent event[s]'" can avoid "an amorphous inquiry," even if examination of multiple state-law provisions is required); see also, *e.g.*, *Georgia State Bd.*, 552 U.S. at 18-19 (explaining that, under the 4-R Act, courts must ascertain "true market value" even if the question is "complex" and there is a "clash of experts"). In this

case, the district court was able to consider Alabama's motor-fuel taxes, and to make detailed factual findings about how they compared to the sales and use tax on diesel fuel, without undue difficulty or expense. See Pet. App. 56a (concluding, based on parties' stipulations and a one-day bench trial that included expert testimony, that "the tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same"); *id.* at 21a (Cox, J., dissenting) (noting that respondent did not challenge that factual conclusion on appeal); see also *Norfolk S. Ry.* v. *Alabama Dep't of Revenue*, No. 08-cv-00285, 2008 WL 6515212 (N.D. Ala. Apr. 9, 2008) (making similar findings in prior case involving the same Alabama tax scheme), aff'd, 550 F.3d 1306 (11th Cir. 2008).[10]

Courts have regularly carried out similar analyses in dormant Commerce Clause cases and in suits alleging that state taxes discriminated against the federal government. See pp. 23-26, *supra*. Courts have noted in those contexts that it sometimes may be difficult for a State to prove that an alternative tax is actually comparable to the challenged tax. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 338-339, 344 (1996). But any such difficulty goes to whether the State's justification for differential treatment should ultimately be accepted, not to whether it is cognizable. If

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[10] The court of appeals relied on a First Amendment case, *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), for the proposition that courts "are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." *Id.* at 589-590 (quoted in Pet. App. 16a). But the Court in that case demanded a particularly high level of "precision" in light of the "heavy burden on the State to justify" singling out the press for taxation. *Id.* at 589 & n.12, 592-593. That concern is not implicated here.

a State in a Section 11501(b)(4) case fails to establish that the alternative tax is sufficiently comparable to the tax imposed on railroads, then the court should reject the asserted justification. See *CSX*, 131 S. Ct. at 1108-1109; cf. *Fulton Corp.*, 516 U.S. at 333, 344. The mere possibility that a State might fail in that regard, however, provides no basis for categorically refusing to consider whether a tax applicable to the comparison class but not to railroads negates a claim of "discriminat[ion]" under Section 11501(b)(4).[11]

3. The appropriate disposition of this case is a remand to the court of appeals. In holding that respondent had established a meritorious discrimination claim, the court below expressly disregarded an important aspect of the Section 11501(b)(4) analysis. That court should have the initial opportunity to review, under the correct legal standard, the district court's conclusion that "neither transportation mode is unjustifiably favored" because railroads and motor carriers are subject to comparable taxes on their motor fuel. Pet. App. 57a.

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[11] The "theoretical difficult[y]" with which the court of appeals expressed particular concern was that the relative amounts paid by rail carriers and motor carriers under their respective diesel-fuel-related taxes might shift over time, because the sales and use tax is tied to the price of fuel while the motor-fuel taxes are not. Pet. App. 14a-15a. That difference could be relevant to the comparability analysis. See *id.* at 57a-58a. The court of appeals was wrong, however, to use an entirely hypothetical future change in the price of diesel fuel as a reason to reject the State's justification—or, indeed, any justification relying on a tax other than the challenged tax. See *id.* at 13a, 16a. Under Section 11501(b)(4), the question is whether the challenged tax "discriminates," not whether it *might* discriminate at some future time if particular contingencies occur.

Resolution of respondent's claim of discrimination vis-à-vis interstate water carriers does not turn on whether the water carriers pay a comparable alternative state tax; petitioners have not asserted that any such comparable tax exists. See *CSX*, 131 S. Ct. at 1106 n.3. Here too, however, a remand is appropriate. The district court gave several reasons for rejecting respondent's claim "that the taxes it pays compared to water carriers are discriminatory." Pet. App. 63a; see *id.* at 64a-66a. Rather than evaluate the district court's rationales, the court of appeals focused almost entirely on motor carriers and discussed water carriers only in a single sentence of its analysis. *Id.* at 17a. Accordingly, a remand is warranted for fuller consideration of respondent's claim of discrimination as compared to interstate water carriers.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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STATUTORY APPENDIX

1. 49 U.S.C. 11501 provides:

Tax discrimination against rail transportation property

(a) In this section—

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdic-

tion has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical princi-

ples applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

AMICUS CURIAE BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, et al.,

Petitioners,

—v—

CSX TRANSPORTATION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE ALABAMA CITIES AND COUNTIES, CITY OF MOBILE ET AL. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE AMICI CURIAE[1]

The subject of this certiorari review is a claim of discrimination under the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4) (the "4-R Act"). The review raises two issues: in deciding whether a challenged tax discriminates against railroads in violation of (b)(4), to which other taxpayers should the railroad be compared, and should the challenged tax be reviewed in isolation or as part of the State's tax scheme. The Eleventh Circuit decided, first, to compare CSX to its competitors (motor carriers and interstate water carriers) and, second, that the challenged tax is to be reviewed in isolation, without reference to the State's tax scheme.

Alabama cities and counties file this brief because CSX is poised to leverage the decision in this case against them. Since April 4, 2008, when CSX filed its complaint against the State of Alabama, it has filed refund claims in State Court against several Alabama cities and counties, including those which are signatories to this Brief, for repayment of all of the city and county sales and use tax it has paid on purchases of diesel fuel. Claims against the

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

signatories to date, by CSX and other railroads, total approximately $22,865,695 in taxes alone:

Alabama Cities		
Tuscaloosa 2010-2013	$	156,392
City of Mobile Dec.2008-Jan.2011	$	134,672
City of Birmingham 2004-2013	$	13,441,948
City of Montgomery Dec.2008-Jan.2011	$	212,069
Total	**$**	**13,945,081**
Alabama Counties		
Colbert County 2010-2013	$	1,938,844
Tuscaloosa County 2010-2013	$	234,358
Shelby County 2004-2011	$	882,838
Montgomery County 2004-2011	$	2,031,581
Mobile County 2007-2011	$	33,286
Jefferson County 2008-2013	$	3,799,707
Total	**$**	**8,920,614**

Alabama authorizes local governments to levy sales and use taxes that parallel the State sales and use tax. Alabama Code (1975) § 11-51-200 through 204. In each of its refund claims, CSX argues that because the local sales and use tax parallels the State tax, its success in this federal case against the State will compel a refund of all sales and use tax paid to Alabama cities and counties on the purchase and consumption of diesel fuel. In fact, CSX includes the sales and use tax paid to cities and counties in its measure of damages in the case before this Court.[2] All of the State actions are stayed pending the outcome of this case.

The Eleventh Circuit wrongly decided this case, and its decision threatens to work an injustice against Alabama cities and counties in the pending State Court refund actions. The Court determined that discrimination for purposes of (b)(4) is properly decided by comparing CSX to its competitors, motor and interstate water carriers, not to all commercial and industrial taxpayers. Using this small comparison class, cities and counties could be found to have violated the 4-R Act due to the happenstance of their local economies and without consideration that they collect sales and use tax on the purchase and consumption of diesel fuel from local businesses, including major taxpayers such as Teledyne,

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[2] *See* CSX Brief in Opposition to Writ of Certiorari at p.5, "The complaint [in this case] alleged that the 4-R Act prohibits the State of Alabama and counties and municipalities within Alabama from imposing sales and use taxes on CSXT's purchase and consumption of diesel fuel . . . ."

Hyundai Power Transformers USA, Inc., and Dow Corning Alabama, to name a few.

Building on a tortured reading of § 11501(b)(4), the Eleventh Circuit next concludes that whether the challenged tax is discriminatory is to be determined with reference to the challenged tax alone, without consideration of the entire tax scheme. For motor carriers, the Eleventh Circuit found the State's sales and use tax discriminatory without considering that the challenged exemption is available only to those taxpayers that pay a complementary motor fuels tax.

The Court further stacked the deck against cities and counties by placing the burden on the State to prove substantial justification for treating the railroad differently from its competitors. In no other context does the party defending against a claim of discrimination bear the burden of disproving the claim. The ultimate burden of proving discrimination resides as it should with the party asserting the claim.

The Eleventh Circuit decision is a dangerous precedent for Alabama cities and counties waiting to litigate State refund claims. Should the State courts follow the Eleventh Circuit lead, cities and counties that do not target the railroads for disproportionate taxation face not only refund claims but also losses of future revenues. Funds badly needed to provide public services and protect public safety will be redirected to railroads, despite the undisputed finding by the district court that CSX suffered no discriminatory effect from the challenged tax. The Court's rationale for this inequitable result is that one of the purposes of the 4-R Act is to protect the

financial stability of the railroad. Surely Congress never intended, absent any showing of discriminatory effect, to stabilize the finances of the railroads through cash infusions from state and local government.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2011 this Court reviewed whether the Eleventh Circuit properly dismissed the claim CSX filed against the State of Alabama alleging that the State discriminated against it in violation of § 11501(b)(4) by exempting motor carriers and water carriers from the sales and use tax it pays on the purchase and consumption of diesel fuel. This Court reversed and decided that a tax exemption is "another tax" for purposes of (b)(4). But it left the questions of whether in deciding CSX's claim a federal court should consider only the specific tax challenged or the entire tax scheme, and whether the court must compare the taxation of CSX not merely to its competitors but to all commercial and industrial taxpayers. These and all other issues were left to the trial court to determine whether "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *CSX Transportation, Inc., Petitioner v. Alabama Department of Revenue ("CSX II")*, 131 S.Ct. 1101, 1114 (2011). Acknowledging that "[d]iscrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified," the Court

concluded that, although the task may be hard, Congress directed courts to review this challenge, and that they must do. *Id.*

On remand, the district court followed this Court's directive, but the Eleventh Circuit dodged its duty by limiting its review to the specific tax challenged, not the entire tax scheme, and by deciding discrimination by comparing the railroad to its competitors, not to all commercial and industrial taxpayers.

For Alabama's cities and counties, revenues upwards of $22 million in refunds plus future revenues are threatened by the Eleventh Circuit decision, and Amici cities and counties file this brief in support of the State of Alabama Petition. Courts must look beyond the tax challenged to the entire tax scheme to determine if a railroad has suffered discrimination in violation of § 11501(b)(4). The text of (b)(4) does not confine a Court's inquiry to the tax challenged, and traditional deference to State sovereignty demands review of the challenged tax in context. In this case, the allegedly discriminatory Alabama sales and use tax exemptions on motor fuel point to the complementary tax that explains the State's justification for exempting motor carriers but not railroads from sales and use tax on their purchase and consumption of diesel fuel. Motor carriers pay an equivalent, in fact a higher, motor fuel excise tax under Chapter 17 of the State's Revenue Code, a Chapter cross-referenced in the exemption challenged.

The district court heard the evidence and reached factual findings that CSX failed to meet its

burden of proving discrimination. In error, the Eleventh Circuit placed the burden on the State to prove an element of the railroad's case, lack of substantial justification for its dissimilar treatment of CSX and motor carriers, and ignored the unchallenged findings of the district court.

The Eleventh Circuit also erred by analyzing "discrimination" under § 11501(b)(4) by comparing CSX to its competitors instead of all commercial and industrial taxpayers. Were this flexible analysis applied to Alabama's cities and counties, CSX would be better able to prove discrimination in some cities and counties than others, depending not on the intentional acts of the local jurisdictions in levying taxes that target railroads to raise revenues from non-voting companies unable to defend themselves, but on the gratuitous circumstances of their local economy and geography, *i.e.*, what railroad competitors are active in their jurisdictions? Does the city or county have a port? Principles of federalism decry jeopardizing the revenues cities and counties rely upon to provide public services to pay out claims on CSX's insubstantial cause.

Unless the Eleventh Circuit decision is reversed, Alabama cities and counties will be unjustly harmed by payments of millions of dollars in refunds plus losses of millions of dollars of future revenues. The district court was the only court in this multi-year litigation to review the facts and reached the unchallenged conclusion that CSX failed to prove that it suffered any discriminatory effect from the alleged violation. The Eleventh Circuit decision must

be reversed to avoid a windfall to the railroad at the cost of the citizens of Alabama.

ARGUMENT

I. FEDERAL COURTS MUST LOOK AT THE TAX SCHEME BEYOND THE TAX PROVISION CHALLENGED WHEN DECIDING A CLAIM OF DISCRIMINATION UNDER 49 U.S.C. § 11501(b)(4)

This case challenges the sales and use tax the State of Alabama collects from CSX on its purchase and consumption of diesel fuel. Its competitors, motor carriers and interstate water carriers, are exempt from sales and use tax on diesel fuel. The Eleventh Circuit found the dissimilar treatment of CSX and its competitors discriminatory, in violation of § 11501(b)(4). Pet.App.2a. That Court confined its inquiry to the sales and use tax exemptions, refusing to consider the complementary tax on motor fuels paid by motor carriers or the district court's unchallenged findings of fact that CSX offered no evidence of allegedly discriminatory effects from the State's treatment of its competitors. To the Eleventh Circuit, the State's justification for dissimilar treatment of motor carriers, that they pay an equivalent motor fuel excise tax, "misses the mark." *Id.* at 12a. In agreement with the Eighth Circuit decision in *Union Pacific Railroad v. Minnesota Department of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007), the Eleventh Circuit looked "only at the sales and use tax with respect to fuel to see if discrimination has occurred." *Id.* at 13a. The Court

reasoned that the text of the statute and precedent dictated that "simpler," limited review. *Id.* at 16a. In its interpretation of both the statute and the case law, the Eleventh Circuit is wrong.

A. The Text of Section 11501(b)(4) Does Not Limit a State's Justification for Dissimilar Treatment to the Provision Challenged

1. The Eleventh Circuit Misinterpreted 49 U.S.C. § 11501(b)(4) to Confine the State's Justification for Dissimilar Treatment Under the Challenged Statute to the Statute Itself

Section 11501, Title 49 U.S.C., states in pertinent part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce and a state, subdivision of a state, or authority acting for a state may not do any of them:
>
> * * *
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

As the Eleventh Circuit reads it:

> [T]he statute hardly 'suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state.' [citation omitted] If

> the 4-R Act required us to examine the tax regime for an entire commodity, it would have said so rather than speaking in the singular about 'another tax.'

Pet.App.13a.

Of course, subsection (b)(4) is properly interpreted by what Congress did say, not by what it did not say. Subsection (b)(4) proscribes states from imposing "another tax that discriminates." "Another tax" is the subject of (b)(4). A railroad asserts a claim under (b)(4) by identifying "another tax"—any form of a tax other than a property tax—"that discriminates against a rail carrier. . . . " 49 U.S.C. § 11501(b)(4).[3] In *CSX II*, this Court held that "another tax" may include the Alabama sales and use tax exemptions available to CSX's competitors. 131 S.Ct. at 1105.

The question returned to the federal courts on remand is whether this tax—the sales and use tax exemptions—discriminates against the rail carrier. The verb "discriminate" directs the federal courts how to answer that question.

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[3] The last time this case was before this Court, the Eleventh Circuit's interpretation of "another tax" was also at issue. In *Norfolk Southern Ry. Co. v. Alabama Dept. of Revenue*, 550 F.3d 1306 (11th Cir. 2008), (rev'd by *CSX II*) the Eleventh Circuit determined that (b)(4) does not apply to a tax exemption because an exemption is not "another tax." "The language of (b)(4) prohibits a 'discriminatory tax,' not a discriminatory tax exemption." *Id.* This Court disagreed with that completely different interpretation of "another tax" by the Eleventh Circuit and ruled that an exemption can be the subject of a complaint under (b)(4). The Eleventh Circuit's new interpretation of "another tax" is equally wrong.

Inexplicably the Eleventh Circuit reads (b)(4) to restrict its inquiry into whether CSX suffered discrimination by referring back to the phrase "another tax." Pet.App.13a. ("If the 4-R Act required us to examine the tax regime for an entire commodity, it would have said so rather than speaking in the singular about 'another tax.'")

But the singular phrase "another tax" is the tax—or here the exemption—challenged. Grammatically it is the subject of (b)(4). The singular phrase infers nothing about how the challenged tax should be assessed for fairness; whether the comparison includes the entire tax structure of the State, a complementary tax, or any other tax scheme. The analysis of the challenged tax is governed by the verb "discriminate," not by the subject of (b)(4), "another tax."

In *CSX II*, this Court addressed the meaning of "discriminate" in the context of (b)(4):

> The key question thus becomes whether a tax might be said to "discriminate" against a railroad under subsection (b)(4) because the State has granted exemptions from the tax to other entities (here, the railroad's competitors).

CSX II, 131 S.Ct. at 1108.

After reviewing the definitions of "discriminate" in *Black's Law Dictionary* and *Webster's Third New International Dictionary* (1976), p. 648, this Court concluded that a tax scheme can discriminate by providing exemptions to some but not others, "assuming the groups are similarly situated and

there is no justification for the difference in treatment."[4] *Id.* at 11090 (emphasis added).

If the State's justification for dissimilar treatment is confined to the challenged tax, the railroad will win virtually every (b)(4) case it files challenging an exemption. In fact, it appears that it has[5]. If "another tax" is both the subject of the inquiry (the allegedly discriminatory tax), and the entire tax scheme by which "substantial justification" must be analyzed, the State has nowhere to turn to show sufficient justification[6].

Webster defines "tautology" as something that is true by virtue of its logical form alone; a needless repetition of an idea, statement or word. By confining its analysis to the single sales and use tax provision

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[4] Justices Thomas and Ginsberg in dissent note that "'[d]iscriminates' standing alone is a flexible word." They would hold in the context of (b)(4), a tax discriminates if it "target[s] or single[s] out railroads by comparison to general commercial and industrial taxpayers." 131 S.Ct. at 1114.

[5] *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F. 3d 984, (8th Cir. 1999); *Union Pac. R. Co. v. Minn. Dep't of Revenue, supra.*, *Burlington N. R.Co. v. Comm'r of Revenue*, 509 N.W. 2d 551 (Minn. 1993); *Ill. Centr. R. Co. v. Tenn. Dep't of Revenue*, No. 3: 10-CV-00197, 2013 WL4521013 (M.D. Tenn. Aug. 27, 2013); *Kan. City S. Ry. Co. v. Bridges*, No. Civ. A. 04-2547, 2007 WL977552 (W.D. La. Mar. 30, 2007).

[6] This rigged game is made all the more unfair by the Eleventh Circuit's determination that it is the burden of the State to prove (not merely "offer") a substantial justification for the allegedly dissimilar treatment. In this discrimination claim, like any other, it is the railroad's burden to prove discrimination, which by this Court's definition, requires proof that dissimilar treatment is "without sufficient justification."

challenged, denying the State access to other provisions in the tax code to offer a justification for dissimilar treatment, the Eleventh Circuit converts what should have been a knotty economic inquiry under (b)(4) into a tautology. The tax is discriminatory because "[r]ail carriers pay the State's sales tax—motor and water carriers do not." Pet.App.16a.

B. The Eleventh Circuit's Interpretation of Section 11501(b)(4) Violates Traditional Federal Court Deference to State Court Tax Schemes

Both Congress and the federal courts have historically shown deference to the states in matters of taxation, based upon a well-settled and longstanding principle. The reason for this deference is clear:

> This Court, even before the enactment of § 1983, recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems. As Justice Field wrote for the Court shortly before the enactment of § 1983:
>
> > It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 11 Wall. 108, 110, 20 L.Ed.65 (1871).

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 102 S.Ct. 177, 179 (1981).

The confining approach of the Eleventh Circuit allows no room for the principle of deference.

It is true that the principle of restraint may yield in those cases in which a federal right might otherwise be lost. *Tully v. Griffin*, 429 U.S. 68, 73 (1976). But the principle does not disappear simply because a federal right is asserted. Rather, a court is to use the least intrusive and disruptive means possible to protect the right. For example, in *Burlington Northern Railroad Co. v. Bair*, 584 F. Supp. 1129 (S.D. Iowa 1984), and *Kansas City Southern Railway Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011), the courts exercised restraint by limiting the remedy under the 4-R Act to prospective relief. In *Dept. of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994), this Court acknowledged that the principle of federalism, central to state sovereignty, compelled it to avoid expanding § 11501 beyond its clear and manifest purpose: "When determining the breadth of a federal statute that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope."

The term "discriminate" is not precise. As Justice Thomas stated in his dissent in *CSX II*, the term "discriminate" is flexible, context-dependent, and ambiguous in certain aspects. *CSX II*, 131 S.Ct. at 1115. (Thomas, J., dissenting). Nor does the statute or the cases construing it provide any guidance as to the meaning of "sufficient justification." *Id.* at 1119. *See also ACF Industries,*

Inc., 510 U.S. at 337, 343 (scope of § 11501 (b)(4) not as clear as (b)(1)-(3)). This lack of clarity and specificity did not require the Eleventh Circuit to abandon the principle of restraint as it did; to the contrary, the lack of clarity compels a more careful and exacting exercise of deference:

> The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language.

Cipollone v. Liggett Group, Inc., 505 U.S. 506, 533 (1992) (Blackmun, J. concurring in part and dissenting in part) (emphasis in original). Here the question is not whether Congress intended to remedy discrimination against railroads by "another tax," but to what extent. The Eleventh Circuit incorrectly answered "to any extent," by accepting the mere existence of an exemption as *per se* discrimination and refusing to consider even the limited and defined portion of the State's tax scheme which is part and parcel of the challenged exemption.

C. Deference and Common Sense Demand That Courts Allow States to Justify Exemptions That Treat Railroads Differently from Their Competitors with Reference to the Entire Tax Scheme

Assuming for the sake of argument that the broad purpose of the 4-R Act is to address the railroads' competitive disadvantage by ensuring that they cannot be taxed more than their competitors, the courts must still allow states and local governments to justify exemptions on the ground that they do not, in fact, disadvantage railroads. Competitive disadvantage is, after all, what CSX complains about in this case: its "main competitors do not pay the sales tax when they purchase diesel fuel, giving them a competitive advantage over CSX." Pet.App.5a. How can this be determined unless complementary taxes paid by the competitors are considered?

The Eleventh Circuit's refusal to consider the complementary motor fuels tax finds no basis in the Supreme Court's decision in *CSX II*, but instead is based upon a line of cases from the Eighth Circuit originating in a 1987 case from the Fifth Circuit. Those cases, as stated by the Eleventh Circuit, concluded that under § 11501 (b)(4) a court may only look at the tax being challenged to see if there is sufficient justification, and that the actual fairness of the state tax scheme, based upon other applicable taxes, is too difficult and expensive to determine because it would require an evaluation of the entire state tax structure. Pet.App.13a. The Eleventh Circuit "flout[ed] the congressional command," and

declared the matter beyond it. Pet.App.16a. ("We therefore decline to undertake the Sisyphean burden of evaluating the fairness of the State's overall tax structure in order to determine whether a single tax exemption causes a state's sales tax to be discriminatory.")

In doing so, the Eleventh Circuit wrongfully relies on *Kansas City S. Ry. v. McNamara*, 817 F. 2d 368 (5th Cir. 1987), instead of this Court's decision in *CSX II*. In *McNamara*, railroads operating in Louisiana sued to enjoin collection of the Louisiana Tax on Transportation and Communication Utilities (hereinafter "T&C Tax") alleging that it discriminated against them in violation of § 11501(b)(4).[7] The district court agreed, and enjoined the collection of the T&C Tax, but only to the extent that it exceeded a locally assessed business license tax. On appeal, the Fifth Circuit affirmed the district court's holding that the T&C Tax discriminated against railroads in violation of the 4-R Act, but reversed its ruling that the discriminatory tax could be collected in part.

Louisiana argued that the T&C Tax was not discriminatory because it was a "complementary tax," equivalent to the state's sales and use tax, and that railroads did not pay their fair share of sales and use tax. *McNamara*, 817 F.2d at 376. The Court refused to assess the fairness of a facially

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[7] The T&C Tax was a tax of 2% on the intrastate gross receipts of, "public utilities" in Louisiana. It applied to railroads, motor bus lines, motor freight lines, express companies, boat or packet lines and pipe lines. *McNamara*, 817 F.2d at 374.

discriminatory tax against the entire tax structure of the state.

The Eleventh Circuit misinterpreted *McNamara* for two reasons. First, the case is factually distinguishable. The State of Alabama did not ask the Court to look at its entire tax scheme; it asked the Court only to follow a cross-citation to its complementary motor fuel excise tax, a tax cross-referenced in the sales and use tax challenged. *See* Section II. D., below.

Second, *McNamara* was decided before this Court issued its decision in *CSX II*. Explaining its decision to reverse the district court's ruling, the Fifth Circuit commented:

> Furthermore, if we affirm the district court's partial injunction, we will consign every 4-R case to a trial on the merits like the one in this case—an unproductive "battle of the experts" on whether any taxes levied in a state are "equivalent" and if so, which ones . . . we think a trial on whether a tax is discriminatory or not can and should be avoided.

817 F.2d at 379. The law has evolved since the Fifth Circuit decided *McNamara*. This Court's decision in *CSX II* directed the lower court to determine whether CSX could demonstrate in fact that Alabama's sales tax discriminates against it and whether the State could justify the dissimilar treatment of railroads versus water and motor carriers. Recognizing that the claim of discrimination might raise "knotty questions," this Court stated:

> . . . Congress has directed the federal courts to review a railroad's challenge: . . . we would flaunt the congressional command were we to declare the matter beyond us.

CSX II at 1114.

To the extent *McNamara* proscribes a review of "knotty questions" to determine whether a tax discriminates against railroads under (b)(4), including whether there is an offer of "sufficient justification," it is overruled by *CSX II* and the Eleventh Circuit wrongly relied on it.

The Eleventh Circuit considered no more than the statutes that this Court analyzed in *CSX II*. If this Court found those statutes conclusive of the question of discrimination under (b)(4), this Court would have decided the case in *CSX II*. But it did not. It remanded the case for the federal courts to determine whether Alabama taxes "in fact" discriminate against railroads by exempting interstate motor and water carriers. *CSX II*, at 1114. Without discussion, the Eleventh Circuit ignores this directive and determines that the existence of these exemptions constitutes discrimination as a matter of law[8].

D. In This Case the State's Justification for Dissimilar Treatment Is Found Within the Tax Scheme Challenged

In this case the sales and use tax exemption at issue, the *prima facie* "discrimination" itself, cites the

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8 *See* Section II, *infra*.

complementary motor fuels excise tax on which the State's justification is based. Turning to the cited code section is hardly a "Sisyhpean burden of evaluating the fairness of the State's overall tax structure." Pet.App.16a. The Eleventh Circuit imagines an obstacle that does not exist, a boulder when there is, in truth, simply a pebble. [9]

Alabama's Sales and Use Tax is codified at Alabama Code, Title 40, Chapter 23. It levies a tax of 4% on sales of tangible personal property within the State (Ala. Code § 40-23-2) and a use tax of 4% on tangible personal property stored, used, or consumed in the State (Ala. Code § 40-23-61(a)). [10] The sales and use tax applies to all transactions in the State's jurisdiction that are not exempt.

The exemptions, including those that are the subject of this case, are also found in Chapter 23. First, Alabama Code § 40-23-4(a)(1) exempts from sales tax: "The gross proceeds of the sales of lubricating oil and gasoline as defined in

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[9] The code sections at issue are located in a single bound volume of the Alabama Code, Volume 21A. The "Sisyphean burden" from which the Eleventh Circuit recoils is, in fact, no more than an exercise in flipping between a total of eight (8) pages in volume 21A. (§ 40-17-325 at p. 101, § 40-23-2 at pp. 532-535, and § 40-23-61 at pp. 598-600). Surely a federal court's evaluative capacities are not over-taxed by such an exercise, especially when, as here, a state tax is being attacked.

[10] As a direct pay permit holder, CSX pays taxes on diesel fuel directly to the State when it withdraws the fuel for use in the State, Ala. Code § 40-23-1(a)(10).

§§ 40-17-30[11] and 40-17-170 . . . ." Section 40-23-62(4) exempts from use tax lubricating oil and gasoline as defined in §§ 40-17-30 and 40-17-170, "the storage, use or consumption of which is otherwise taxed." *See also*, Alabama Code § 40-17-325(b) (the complementary section that exempts diesel fuel used on roads from sales and use tax). The sales and use tax exemptions are granted to sales of lubricating oil and gasoline subject to taxation under Chapter 17; they show no favoritism—they do not mention motor carriers.

As explained by the State, Chapter 17 applies to diesel fuels used on road that are subject to a motor fuels tax of 19¢ per gallon. Ala. Code § 40-17-325(a). To prevent double taxation, the purchase or consumption of diesel fuel is taxed either under Chapter 23, Sales and Use Tax, or Chapter 17, Gasoline and Other Motor Fuels, Lubricating Oils[12]. Taxes are paid under either Chapter 23 or Chapter 17; one or the other, not both.

The second exemption at issue is that found in Chapter 23 at Section 40-23-4(a)(10):

> The gross proceeds from the sale or sales of fuel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other

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[11] Section 40-17-30 is repealed and superseded by Section 40-17-322, *see* Acts of Alabama Act No. 2011-565.

[12] Off road diesel fuel, the commodity purchased by the railroad, taxed under Chapter 23, is exempt from the motor fuels tax, Ala. Code (1975) § 40-17-329(a)(2).

> watercraft therein for purposes of this exemption being referred to as 'vessels' engaged in foreign or international commerce or in interstate commerce . . . [13]

The exemption is not available to vessels engaged in intrastate commerce.

This case does not require the Court to examine the tax regime for an entire commodity or the entire tax structure of the State. It involves only one tax—sales and use tax under Chapter 23. The State's justification for treating motor carriers differently from railroads arises under the challenged tax—the sales and use tax[14]. The State's straightforward purpose—to avoid double taxation—is evident on the very face of the sales and use tax code, the tax scheme that is challenged. [15]

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[13] Ala. Code § 40-23-62(12) provides a comparable exemption from use tax for water carriers engaged in international or interstate commerce.

[14] Chapter 23 exempts from its levy not "motor carriers," but sales of lubricating oil and gasoline "taxed" under Chapter 17. Ala. Code § 40-23-4(a)(1).

[15] The State's compelling justification for its dissimilar treatment of railroads and motor carriers might have convinced the Fifth Circuit in *McNamara*, the case on which the Eleventh Circuit relies to justify its refusal to consider tax provision other than the two exemptions at issue, that the tax exemption is not discriminatory. The complementary tax exemptions, railroads from motor fuel tax and motor carriers from sales tax on the purchase or use of diesel fuel, achieve a straightforward equity that the Court might have condoned:

> It may be in the appropriate case we would allow the state to save a facially discriminatory tax by showing

The State did not ask the Eleventh Circuit to engage in a "Sisyphean burden of evaluating the fairness of the State's overall tax structure in order to determine whether a single tax exemption causes a state's sales tax to be discriminatory." Pet.App.16a. In fact, the district court was able to roll the "boulder" to the top of the hill. On remand, the parties stipulated to many of the underlying facts, and the district court resolved all remaining factual disputes through the testimony of five witnesses, two for CSX and three for the State, presented at a bench trial on April 12, 2012. *See* Section II. B., *infra*.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY REVERSED THE DISTRICT COURT FINDING THAT CSX FAILED TO MEET ITS BURDEN OF PROVING DISCRIMINATION AS A MATTER OF FACT

A. The Eleventh Circuit Wrongly Relieved CSX of Its Burden to Prove Discrimination

CSX II places the burden of proving discrimination on the railroad. The Court clarified that its ruling was only that CSX could assert a claim based on tax exemptions, not "whether the railroad will prevail—that is, whether it can prove the alleged discrimination . . . " *CSX II*, at 1109, n.8:

> that it is necessary to "compensate" for some state or local tax—a tax applicable to "other commercial and industrial taxpayers—that for some reason cannot be levied against the railroads.

Kansas City S. Ry. v. McNamara, 817 F. 2d 368, 376 (5th Cir. 1987).

> "We hold that CSX may challenge Alabama sales and use taxes as 'tax[es] that discriminat[e] against . . . rail carrier[s]' under § 11501(b)(4). We do not address whether CSX should prevail in that challenge—whether, that is, Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers."

131 S.Ct. 1114 (emphasis added)

CSX, the claimant, bears the burden of proving that the challenged tax in fact discriminates against it. For the majority that means CSX must prove that the challenged exemptions treat the railroad dissimilarly from the appropriate competitive class and that the dissimilar treatment is without sufficient justification. Whether a railroad must allege lack of sufficient justification to state a claim under § 11501(b)(4) is not clear (*see CSX II* dissent, 131 S.Ct. at 1119, n. 5), but that it is the burden of CSX to prove "discrimination," which by definition includes "without sufficient justification," is not in doubt.

As Justices Thomas and Ginsberg suggest, the burden of proof in a claim under § 11501 (b)(4) can be handled in two different ways. Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) model, the complainant must carry the initial burden of establishing a *prima facie* case of discrimination under § 11501(b)(4). The burden then shifts to the State to "offer" sufficient justification for dissimilar treatment by the challenged tax, but the burden of the State is production, not persuasion. The claimant

bears the ultimate burden to prove that the dissimilar treatment is without sufficient justification. Under the *McDonnell Douglas* model, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *USPS Bd. Of Governors v. Aikens*, 460 U.S. 711, 717 (1982) (concurring opinion of Justices Blackmun and Brennan).

Alternatively, a claim under § 11501(b)(4) can be treated like a challenge to a tax under the Equal Protection clause, which involves neither fundamental rights nor suspect classifications. A classification in a taxing statute is presumed constitutional and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2082 (2012). The dissent in *CSX II* suggests this model, under which the complainant would have to allege lack of sufficient justification to state a claim under § 11501(b)(4).

Under either model, CSX must prove discrimination. The Eleventh Circuit erred on this basic and essential point, finding that the rail carrier makes a *prima facie* case under § 11501(b)(4) simply by showing that the tax in question exempts competitors, and that it then becomes the burden of the State "to justify its discriminatory tax." Pet.App.12a.

The Eleventh Circuit attempts to support this conclusion with a citation to footnote 8 of this Court's decision in *CSX II*. But the Eleventh Circuit misreads this Court's following footnote: "Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers." *CSX II*, 131 S.Ct. at 1109, n. 8 (emphasis added). The operative word is "offer" not "prove." At most, this suggests a *McDonnell Douglas* model, in which the State produces a justification but the ultimate burden of proving discrimination remains with the claimant.

Without discussion, the Eleventh Circuit reversed the district court's finding that proving discrimination was the job of CSX, and a job which CSX failed. CSX failed to meet its burden of proof that it suffered discrimination:

> Moreover, CSX offered no evidence at trial regarding the alleged discriminatory effects as it relates to water carriers . . . As CSX retains the burden of proof to establish discrimination, the court refuses to assume a discriminatory effect based solely on CSX's allegations.

Pet.App.58a. *See also* Pet.App.64a (as to water carriers).

The Eleventh Circuit error on burden of proof is outcome determinative. The Eleventh Circuit ruled for CSX by relieving the railroad of the burden the district court properly placed upon it—to prove discrimination.

The significance of the Eleventh Circuit's error can be measured in millions of dollars. Without criticizing or contesting the district court's finding that CSX offered no evidence of discrimination, the Court reverses. On interstate water carriers, the Court provides only the conclusory comment that "no one can seriously dispute that the water carriers . . . are the beneficiaries of a discriminatory tax regime." Pet.App.17a. But someone did—the trier of fact.

The Eleventh Circuit takes (b)(4) where Justices Thomas and Ginsberg warned it would go. The shield to protect non-voting national railways against discrimination has turned into a sword to exact a windfall from state and local governments.

B. The District Court's Factual Findings That CSX Failed to Prove Discrimination Are Unchallenged and Fatal to CSX's Claims

On remand from this Court's decision in *CSX II*, the district court conducted an *ore tenus* evidentiary hearing to determine whether CSX could satisfy its burden to prove that "Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." Pet.App.33a. The district court held a bench trial, took testimony from CSX's and State's witnesses, and accepted numerous stipulated facts. *Id.* at 33a-34a.

Here are the unchallenged factual findings of the district court[16]:

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16 In his dissent from the Eleventh Circuit opinion, Circuit Judge Cox accepted the findings of the district court as

1. As to motor carriers, "CSX failed to meet its burden of proof that it suffered from discrimination." *Id.* at 58a. This factual finding was based on the following unchallenged facts:

a. "[T]he tax rate imposed per gallon of diesel fuel for rail carriers and motor carriers is essentially the same." *Id.* at 54a.

b. "[F]rom January 26, 2007 through December 25, 2009, motor carriers paid more per gallon of diesel fuel (average price per gallon + 19¢ per gallon) than rail carriers (average price per gallon + 4% sales tax per gallon)." *Id.* (citing *CSX II*, 131 S.Ct. at 1108).

c. "[E]ven when factoring the local (city and county) sales and use taxes imposed on rail carrier's diesel fuel, rail carriers and motor carriers paid similar rates per gallon of diesel fuel from January 2007 through December 2009." *Id.* at 56a and 57a.

d. "The two competitors [rail carriers and motor carriers] pay a substantially similar tax rate on diesel fuel, and accordingly, neither transportation mode is unjustifiably favored." *Id.* at 57a.

2. As to water carriers, the district court found, "CSX offers no evidence regarding the purported discriminatory effect as it relates to water carriers." *Id.* at 63a and 64a. (Also, "CSX offered no evidence at

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accurate: "Because its findings are not challenged on appeal, I accept [the district court's findings] as accurate." Pet.App.21a.

trial regarding the alleged discriminatory effect as it relates to water carriers," *Id.* at 64a.) This factual finding was based on the following:

a. "The stipulated facts merely provide that, according to an analysis of freight movement published by the United States Department of Transportation, in the year 2002, 82% of freight moved intrastate within Alabama was transported by trucks, 6% by rail, and 1% of freight moved intrastate within Alabama was transported by water." *Id.* at 64a.

b. These stipulated facts relating to "intrastate" water carriers failed to satisfy CSX's burden to prove discrimination, however, because "under Alabama law, water carriers involved in solely intrastate transportation are subject to the same sales and use taxes as rail carriers." *Id.*

These, then, are the fundamental and unchallenged factual findings of the District Court concerning discrimination: "CSX failed to meet its burden of proof that it suffered from discrimination" as to motor carriers, and, it offered "no evidence regarding the purported discriminatory effect as it relates to water carriers." *Id.* at 58a, 63a and 64a.

This Court has made clear that a trial court's factual determinations, made *ore tenus*, regarding the existence of discrimination are to be reviewed, if challenged, according the "clearly erroneous" standard as provided in Rule 52 of the Federal Rules of Civil Procedure. In *Anderson v. City of Bessemer*, 105 S.Ct. 1504, 1511 (1985), this Court explained:

> Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous.
>
> [. . .]
>
> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969)

In fact, the Plaintiff did not challenge, and the Eleventh Circuit did not review, the district court's factual findings. The Eleventh Circuit conducted only a *de novo* review of the "district court's application of the 4-R Act." Pet.App.6a.

The factual findings of the district court, therefore, are the facts of this case, including that CSX's evidence failed to establish that the challenged tax provisions are discriminatory. Those facts are fatal to CSX's claim.

In conducting the merits inquiry concerning CSX's evidence of discrimination and the State's offered justification, the district court was scrupulously faithful to this Court's decision in *CSX II* in terms of the proper scope of the inquiry. The district court understood—as the Eleventh Circuit did not—that the "inquiry into discrimination may pose difficulties" and that "[d]iscrimination cases sometimes do raise knotty problems about whether and when dissimilar treatment is adequately justified." Pet.App.54a. (quoting *CSX II*, 131 S.Ct. at 1114). Noting this Court's recognition in *CSX II* that the "exemptions, no doubt, play a central role in CSX's argument; They [the exemptions] demonstrate, in CSX's view, that the State's sales and use taxes discriminate against railroads," the district court concluded:

> Implicit in the Court's holding that exemptions for competitors may create discriminatory treatment is the understanding that the district court must undertake a thorough examination of the exemption at issue. . . . [T]he Court's language necessitates reviewing the relative position of both groups—those purportedly favored and those purportedly unfavored—in order to properly assess a claim of discrimination.

Pet.App.52a. Therefore, the district court concluded:

> [T]his court must ascertain whether the state adequately justifies the sales and use tax exemptions for rail carrier's principal competitors. And indeed, to adequately

> answer that question, this court, unlike the *Lohman* cases, finds it necessary to analyze rail carriers' competitors in "all relevant respects."

Id. at 54a.

The Eleventh Circuit, on the other hand, conducted an "inquiry" that it did not find "knotty" at all. To the contrary, the Eleventh Circuit confined its "inquiry" to the point of finding it simple: "This case, then, becomes much simpler than it would appear at first blush." *Id.* at 16a. The Eleventh Circuit's "much simpler" inquiry is simply irreconcilable with the "knotty" inquiry the federal courts are compelled to conduct in discrimination cases.

The district court made the "hard calls" this Court described in *CSX II*. 131 S.Ct. at 1114. The district court's inquiry was faithful to, and indeed was compelled by, the 4-R Act and this Court's interpretation of it.

III. CLAIMS AGAINST CITIES AND COUNTIES DEMONSTRATE THAT A COMPARISON CLASS OF GENERAL COMMERCIAL AND INDUSTRIAL TAXPAYERS IS THE FAIREST AND MOST PREDICTABLE STANDARD

The first question addressed by the Eleventh Circuit in determining whether the exemption at issue is discriminatory in violation of § 11501(b)(4) is: "against what do we compare the railroads?" Pet.App.7a. The Court's answer is problematic; in this case, the proper comparison class is CSX's competitors, but in a different case, that answer may change to all commercial and industrial taxpayers.

As the State argues (Brief of Petitioners at 39) using any comparison class other than all commercial and industrial taxpayers, to interpret "discriminate" for purposes of § 11501(b)(4) presents serious problems of predictability and fairness for the State and its cities and counties.

Each city and county from which CSX seeks a refund has a unique, local economy influenced by its geography. Some Alabama cities and counties have ports, others do not; some have intrastate lakes; others, like Mobile City and County, have an international port. If the Eleventh Circuit competitive class test were correct, some cities and counties with ports would be more vulnerable to railroads' claims of discrimination in violation of § 11501(b)(4) than landlocked cities and counties. A violation may be found against one jurisdiction but not another, depending not on a levy, grant of exemption or other "discriminatory" act taken by the local government, but on the geography, commercial activity, market conditions or other factors present within its territorial limits that are beyond its control. Worse yet, a tax could convert from nondiscriminatory to discriminatory due to changes in the business of the railroads and their competitors, again beyond the control of local government. More so than States, which are larger with more varied commerce, local governments are susceptible to changing economies, owing to the arrival or departure of possibly a single company. For cities and counties, the unpredictability and inequity that follow a comparison class of competitors threaten the stability of their tax bases.

The sums at stake in these § 11501(b)(4) refund claims against local governments are too high for the legal standard for "discrimination" to unpredictably punish cities and counties for matters beyond their control. As one example, BNSF, Norfolk Southern and CSX have pending claims against the City of Birmingham, totaling approximately $13,441,947, without pre-judgment interest, dating back to 2004 for CSX and 2005 for BNSF. Claims against counties to date approach $9 million.

Both Congress and federal courts have historically deferred to the sovereignty of state and local taxes when reviewing challenges to the taxes they levy and collect:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.
>
> * * *
>
> The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. 'To hold otherwise would be to subject the essential

> taxing power of the State to an intolerable supervision. . . .

Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930).

Federal courts' reluctance to interfere with state and local taxes preserves the delicate balance between federal authority and state autonomy, as well as the respect to be accorded state tax laws by federal courts. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 102 S.Ct. 177. *See also National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995) (aversion to federal interference in state tax matters).

If the Eleventh Circuit were correct, § 11501(b)(4) would stand as an exception to this time honored principle of judicial respect for state tax laws. Cities and counties would be deprived not only of the revenues that fund public services, but also of the certainty of their future revenue streams.

As the State suggests, a textual analysis of § 11501(b)(4) does not support the anomalous results that flow from determining "discrimination" by comparison to the railroad's competitors. The fault lies not in the statute but in its interpretation. The statute can achieve predictable and just results by changing the answer to the Eleventh Circuit's question. In deciding "against what do we compare the railroads," the answer must be, against all commercial and industrial taxpayers.

IV. The Eleventh Circuit Decision Positions CSX To Collect A Windfall Of Millions Of Dollars From Alabama Cities And Counties Without Proving That It Has Suffered Any Discrimination

Amici cities and counties are not parties to this lawsuit, yet CSX includes sales and use taxes paid to local governments in its measure of damages. In the 2008 complaint that started this litigation, CSX alleged that the 4-R Act prohibits the State of Alabama "and counties and cities within Alabama" from imposing sales and use taxes on the railroad's purchase and consumption of diesel fuel. *See* CSX Brief in Opposition to Petition for Certiorari, p. 5.

Alabama law authorizes cities and counties to levy and collect a sales and use tax that parallels the State's sales and use tax. Cities and counties set the amount of their tax levies, but city and county sales and use taxes are subject to all definitions, exceptions, exemptions, rules and regulations that apply to the corresponding State sales and use tax. Ala. Code § 11-51-200 through 204, § 11-3-11.2, § 40-12-4.

CSX filed claims for refunds of sales and use tax it has paid on the purchase and consumption of diesel fuel against cities and counties in circuit courts throughout Alabama. The State court refund claims are all stayed pending the outcome of this case. In these actions, CSX consistently argues that because city and county sales and use taxes parallel State sales and use taxes, the decision in this case will determine the outcome on its refund claims.

The Eleventh Circuit decision, if affirmed by this Court, is a dangerous precedent for the State refund cases. On the two issues before this Court—comparison class and whether substantial justification for dissimilar tax treatment of a railroad can consider the entire tax scheme or only the challenged provision—the answers from the Eleventh Circuit in combination potentially foreclose local governments from raising valid defenses.

On comparison class, the Eleventh Circuit selects the competitors of CSX—motor and water carriers, a flexible standard that can vary from one city or county to another. This comparison class creates inconsistencies and unpredictability in the application of the statute. A claim could arise against a city or county under (b)(4) not from a tax it levies or an exemption it grants but from its ports, its businesses, and other features of its jurisdiction not affected by its legislative acts. Principles of federalism argue against the Eleventh Circuit's interpretation and in favor of a comparison class of commercial and industrial taxpayers.

With this comparison class, cities and counties can show state courts that they collect sales and use tax on the purchase and consumption of diesel fuel from large manufacturers in the State. CSX is not being targeted by the challenged tax, it stands in the same shoes as local, voting commercial and industrial taxpayers.

The Eleventh Circuit's answer to the second issue also hurts cities and counties in state court. The Eleventh Circuit confines the State's substantial justification for its dissimilar treatment of railroads

to the tax challenged, without reference to the entire tax scheme. For cities and counties required by State law to parallel State sales and use tax exemptions, CSX argues the dissimilar treatment the State could not justify in federal court, cities and counties cannot justify in State court.

These challenges are exacerbated by the Eleventh Circuit's erroneous ruling on the burden of proof. If state courts follow the Eleventh Circuit's lead, cities and counties will bear the burden of proving "substantial justification" for allegedly dissimilar treatment of railroads, water carriers and motor carriers. Under § 11501(b(4), as in other claims of discrimination, CSX, the complainant, bears the burden of proving all elements of its claim, including the lack of substantial justification for dissimilar treatment.

Burden of proof is key to the State refund claims. The undisputed factual finding of the district court, the trier of fact, was that CSX failed to meet its burden of proving that it suffered any discrimination. Should the State courts follow suit, and find discrimination absent proof of loss, cities and counties and their citizens, will suffer an injustice.

Respectfully Submitted,

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September 16, 2014

AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE*

Amicus American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,000 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

ATA has a direct interest in this case because many of its members operate in interstate commerce to, from, within, and through the State of Alabama. ATA members purchase, store, and consume diesel fuel in Alabama. These members compete with railroad carriers in interstate commerce in Alabama, because shippers have the ability in many cases to choose between a rail carrier and a motor carrier when they ship property to, from, or through Alabama. As the district court concluded, under Alabama's challenged tax arrangements, both motor

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* The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

carriers and railroads pay a substantially similar tax rate on diesel fuel. ATA's members depend on this level tax playing field to compete fairly with railroads in the provision of shipping services, and the preferential treatment CSX has obtained here amounts to a substantial and unfair advantage.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this case was last before the Court, it held only that a tax paid by rail carriers, but not by its competitors, was subject to challenge under the tax discrimination provision of the Railroad Revitalization and Regulatory Reform (4-R) Act, 49 U.S.C. 11501. *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1109 & n.8 (2010) (*CSX*). Nothing in that decision, however, suggested that in assessing the merits of such a challenge, courts should look only to how the State treats railroad competitors (rather than how it treats commercial and industrial taxpayers generally) and only to the effect of the specific sales and use tax challenged (rather than the burden of the State's overall tax treatment of the diesel purchases at issue). On remand, the Eleventh Circuit did just that, effectively rendering tax exemptions granted to a railroad competitor a *per se* violation of Section 11501(b)(4).

Petitioners have explained in detail how the court of appeals erred by comparing Alabama's taxation of CSX only to that of its competitors, and by refusing to undertake any meaningful inquiry into whether Alabama could justify its dissimilar treatment of railroads by reference to a different tax paid on diesel fuel by motor carriers (but not railroads). ATA

submits this brief to explain further why Alabama's diesel taxes are fully justified, and why the competitor-focused approach taken by the court of appeals will inevitably serve not to *level* the playing field as Congress intended, but to consistently tilt it in in the railroads' favor.

1. The Eleventh Circuit's decision results in a serious competitive disadvantage to motor carriers operating in Alabama. Alabama exempts purchases of on-road diesel from its general sales and use tax because it subjects it to a separate motor fuels excise tax of similar burden. The decision below gives railroads an exemption from Alabama's general sales and use tax, while motor carriers remain subject to the motor fuels excise tax. Because fuel represents a major cost for motor carrier operations, the impact on fair competition in interstate commerce is considerable.

2. Congress did not enact Section 11501 in order to ensure that railroads could purchase fuel at a substantial discount compared to its primary competitors. Section 11501 was one of several measures enacted by Congress to stop States from unfairly shifting their tax burdens onto the backs of interstate carriers—including motor carriers and ari carriers in other measures—by tying the tax fate of interstate carriers to that of in-state commercial interests. Section 11501 does not, however, give railroads the "most-favored-taxpayer" status they have achieved with the decision below.

ARGUMENT

I. The Decision Below Puts Motor Carriers at a Serious Competitive Disadvantage with Railroads.

A. Alabama Treats On-Road and Off-Road Diesel Differently to Avoid Subjecting Motor Carriers to Double Taxation.

1. Alabama law imposes a general 4% tax on the sale and use of tangible goods. See Ala. Code §§ 40-23-2(1), 40-23-61(a), By default, that tax applies to purchases and use of diesel fuel by individuals or businesses. In addition, several Alabama municipalities and counties impose additional sales and use taxes. See Pet App. 35a-36a.

Diesel fuel sold for use on roads or highways, however, is treated differently. Alabama law subjects on-road diesel to an excise tax of 19 cents per gallon. Ala. Code § 40-17-325(a). Alabama exempts fuel subject to the motor fuel excise tax from the general sales and use tax, to avoid double taxation. See Ala. Code § 40-17-325(b).

2. Alabama's practice of treating on-road and off-road diesel differently follows a pattern established in Federal law, and which has been widely adopted by the States. Federal law itself maintains that distinction, levying a 24.4 cent per gallon excise tax on on-road diesel, 26 U.S.C. 4081(a)(2)(A)(iii)-(B), and requiring that off-road diesel (which is exempt from that tax) be dyed to facilitate the detection of excise tax evasion, 26 U.S.C. 4082(a)(2).

In 1934, Congress conditioned receipt of Federal highway construction funds on States' use of motor vehicle fees and taxes—including fuel taxes—for

highway expenses. See Hayden-Cartwright Act, 48 Stat. 993 § 12 (1934). As a result, every State employed an on-road motor fuels tax to fund their highway programs. See Jerry L. Marshall, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 8 (1973). Congress eventually repealed that requirement in 1998. See IRS Restructuring & Reform Act of 1998, 112 Stat. 685 § 1226 (1998). Nevertheless, all 50 States and the District of Columbia continue to impose a distinct on-road motor fuels excise tax. See Federation of Tax Administrators, *State Motor Fuels Tax Rates*, available at http://www.taxadmin.org/fta/rate/mf.pdf (collecting state motor fuel tax rates as of Jan. 1, 2014) (last visited Sept. 10, 2014). And to prevent the problem of double-taxation, most States exempt fuels subject to their motor fuels excise tax from sales tax. See John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration*, 85 (2d ed. 1994).

3. This differential treatment has tended to result in higher taxes for on-road diesel than for off-road diesel. Presumably with this in mind, Alabama law prohibits the use of off-road diesel for on-road purposes without paying the 19-cent motor fuels excise tax. Ala. Code § 40-17-350(l)(4)(d). To ATA's knowledge, there is no mirror-image prohibition against using on-road diesel for off-road purposes, doubtless because there has been no financial incentive to do so. In other words, historically, motor carriers have typically borne a higher per-gallon diesel-fuel tax burden, and Alabama's dissimilar treatment has if anything amounted to *preferential* treatment for railroads in comparison to motor carriers. See also Pet App. 56a-57a (district court's

finding that, during most of the period encompassed by this lawsuit, railroads paid lower taxes on diesel than motor carriers).

B. Unless Reversed, the Decision Below Means That Railroads in Alabama Will Pay Significantly Less for Diesel Fuel than Their Primary Competitors.

Though railroads have not historically paid more tax to Alabama for diesel than motor carriers, Respondent CSX Transportation, Inc. (CSXT) seeks far more than to ensure that it never has to do so. Rather, it seeks to ensure that it (and other railroads) will pay *far less* than its principal competitors when they purchase or use diesel fuel in Alabama.

1. If ensuring only that it would never pay *more* in diesel taxes than motor carriers were CSXT's goal, it could have done so in a number of ways. First, as noted above, there appears to be no prohibition on purchasing on-road diesel—on which the 19-cent per gallon motor fuels excise tax has been paid, and which is exempt from sales and use tax—and using it to power their locomotives. Second, CSXT could have sought to enjoin Alabama's sales and use tax only to the extent that it might exceed the 19 cents per gallon motor fuels excise tax. In either case, CSXT could continue to enjoy its advantage over motor carriers during periods when diesel prices are low enough to make sales and use tax less onerous than the flat motor fuels tax, with the assurance that the tables would never turn on it.

2. Instead, CSXT sought to enjoin Alabama from collecting *any* tax on its diesel fuel. Pet App. 31a. The upshot of the decision below, then, is a

guarantee that CSXT and other railroads will consistently pay 19 cents less than motor carriers pay for every gallon of diesel. That, in turn, translates into an enormous competitive advantage for railroads.

Fuel costs are a major component of motor carrier operations, accounting for up to 20 percent of operating costs. See Federal Highway Administration, *Evaluation of U.S. Commercial Motor Carrier Industry Challenges and Opportunities* § 6, available at http://www.ops.fhwa.dot.gov/Freight/publications/eval_mc_industry/index.htm#6 (last visited Sept. 10, 2014). Like any operational cost inputs, increased fuel costs are ultimately reflected in increased prices for a carrier's services. Effectively requiring motor carriers to pay 19 cents more than railroads per gallon of diesel in Alabama thus represents a significant competitive disadvantage.

And because, as discussed above, many States treat on-road and off-road diesel the way Alabama does, if affirmed the decision below will entrench this competitive disadvantage in other States as well. As we explain immediately below, nothing in the text or history of the 4-R Act suggests that Congress intended to establish so skewed a playing field in the interstate transportation industry.

II. Section 11501(b) Protects Railroads from States That Seek to Prey Upon Nonresident Businesses, but Does Not Offer Them "Most-Favored-Taxpayer" Status.

Section 11501(b) was enacted as part of a wider effort to address the fact that many States were taking advantage of interstate carriers by subjecting them to higher property taxes than in-state

taxpayers bore. To put a stop to this phenomenon, Congress passed a series of measures intended to tie the tax fate of interstate carriers to that of the in-state taxpayers who could hold the States accountable. Properly understood, these measures—Section 11501(b) among them—prevent States from preying on out-of-state industries. They do not, however, offer any particular class of carrier a leg up on its competitors, much less promise the most-favored-taxpayer status that CSXT has effectively obtained for railroads in this case. In light of this Congressional purpose, the court of appeals erred when it focused its discrimination inquiry only on how Alabama taxes railroad purchases of diesel as compared to diesel purchases by competing modes of transportation, rather than as compared to purchases by commercial taxpayers in general.

A. Congress Has Repeatedly Protected Interstate Carriers by Tying Their Tax Treatment to That of In-State Commercial and Industrial Interests.

It took Congress some fifteen years from acknowledging that States were taking advantage of interstate railroads, see *National Transportation Policy*, S. Rep. No. 87-445 at 483-487 (1961), until it passed the 4-R Act in 1976. For nearly all of that period, Congress contemplated measures comprising only what were to become subsections (b)(1) to (b)(3) of Section 11501, prohibiting States from subjecting railroads to property taxes that were out of line with those paid by commercial and industrial entities generally. See Samuel Eckman, *A State-Centered Approach to Tax Discrimination under § 11501(b)(4) of the 4-R Act*, 79 U. Chi. L. Rev. 1051, 1063-1064 (2012). What was to become subsection (b)(4) was

proposed only shortly before the 4-R Act's passage. See *id.* at 1064.

1. When Congress has prohibited discriminatory State taxes against interstate carriers, it has focused on prohibiting States from succumbing to the "temptation to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987). As Justice Thomas put it last time this case was before the Court, "§ 11501(b) responded primarily to what its text describes—property taxes that soaked the railroads." *CSX*, 131 S. Ct. at 1117 (Thomas, J. dissenting). Congress took the same approach to property tax discrimination against motor carriers in the Motor Carrier Act of 1980 (49 U.S.C. 14502), and to property tax discrimination against air carriers in the Airport and Airway Improvement Act of 1982 (49 U.S.C. 40116). Indeed, because of the shared need to protect *all* interstate carriers from this kind of predation, ATA supported the inclusion of Section 11501 in the 4-R Act. See, *e.g.*, *Hearings on Legislation Relating to Rail Passenger Service, Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce*, 94th Cong. 1166, 1178 (1975) (statement of Peter Beardsley, ATA Vice President and General Counsel); *Railroad Revitalization, Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Interstate and Foreign Commerce*, 94th Cong. 618, 621 (1975) (same).

Congress's purpose in enacting these protections has not been to pick winners and losers among the interstate carriers it sought to protect, but simply to "place them on an even playing field with other state taxpayers." *Atchison, Topeka, and Santa Fe Ry. Co.*

v. *Arizona*, 78 F.3d 438, 442 (9th Cir. 1996). In each case, Congress achieved its purpose by directly tying the railroads' (and other interstate carriers') "tax fate to the fate of a large and local group of taxpayers." *Kan. City S. Rwy. Co.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). That tie establishes a substantial political check on States, because it means that in order to "overtax" rail, motor, or air carriers, States would have to similarly "overtax" resident businesses in general—resident businesses in a position to hold the legislature accountable.

The text of the statutes make explicit that this is the strategy employed by the first three subsections of 11501(b), and in the parallel protections for motor and air carriers. Absent any indication in the text or legislative history to suggest that Congress departed radically from that consistent approach when it added 11501(b)(4) to the 4-R Act at the eleventh hour, the latter provision "should be understood to tackle the issue of systemic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence." *CSX*, 131 S. Ct. at 1117 (Thomas, J., dissenting). See also *Kan. City S. Ry. Co.* v. *Koeller*, 653 F.3d 496, 509 (7th Cir. 2011) (discussing "the need to read subsection (b)(4) 'in light of the approach taken in the first three subsections' * * *, which all directly or indirectly look to other commercial and industrial property") (quoting *Burlington N. Ry. Co.* v. *Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991)).

2. To be sure, the 4-R Act *as a whole* had more than one purpose, and its purposes expressly included restoring railroads' financial stability and competitiveness. See, *e.g.*, *CSX*, 131 S. Ct. at 1105

(citing 4-R Act § 101(a), 90 Stat. 33); *Burlington Northern, Santa Fe Railway Co.* v. *Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) (4-R Act was intended to benefit railroads by ensuring their "financial stability"). A number of individual provisions of the Act were aimed directly at furthering that goal. See, *e.g.*, 45 U.S.C. 801(a) (listing, *inter alia*, "ratemaking and regulatory reform," expedited merger procedures, and "financing mechanisms" for rehabilitation and improvement of facilities as measures intended to "restore the financial stability of the railway system of the United States" and promote its revitalization).

It does not follow from this, however, that every miscellaneous provision of the Act—including Section 11501—was intended by Congress to promote the interests of the railroads over those of its transportation competitors. Congress's "revitalization" goal must be reconciled with another express goal of the Act, to "foster competition among all carriers by railroads *and other modes of transportation*." 45 U.S.C. 801(b)(2) (emphasis added). "[T]he Act makes clear that a vibrant rail industry is a critical component of such competition [among transportation modes]; nevertheless, it is a means to an end rather than the end itself." Eckman, *A State-Centered Approach*, *supra*, at 1061. Section 11501's legislative history, along with Congress's protection of motor carriers and air carriers from state tax discrimination, all confirm that the 4-R Act's tax discrimination provision was not intended to give railroads more favorable state tax treatment than its competitors receive. The decision below, and the blow it imposes on fair competition among different modes of transportation, cannot be squared with Congress's overall goals.

3. CSXT recognized as much when this case was last before this Court. Then, CSXT explained that Congress enacted Section 11501 because it found that rail carriers were "'easy prey for State and local tax assessors' in that they are "nonvoting, often nonresident, targets for local taxation," who cannot easily remove themselves from the locality.'" Pet. Br. At 3, *CSX*, *supra* (No. 09-520) (quoting *W. Air Lines, Inc.* v. *Bd. of Equalization*, 480 U.S. 123, 131 (1987), quoting S. Rep. No. 91-630 at 3 (1969)). Similarly, the Association of American Railroads (AAR)—arguing as amicus in support of CSXT—recognized that this was the purpose of Section 11501(b), not to bolster the relative competitiveness of the railroads vis-à-vis other modes of transportation. See Br. of AAR as Amicus Curiae in Support of Pet. at 7-10, *CSX*, *supra* (No. 09-520). As AAR explained, "[t]axing interstate railroads to benefit local constituents is a difficult potion to resist," and that "impulse is unchecked by any effective political counterweight." *Id.* at 8. "It was to check the impulse to pursue parochial state interests at the expense of the greater national good that Congress enacted Section 11501." *Ibid.* (citing S. Rep. No. 94-499, at 2-3 (1975); H.R. Rep. No. 94-725, at 53 (1975)).

B. The Decision Below Upends Congress's Strategy by Instead Granting Railroads "Most Favored Taxpayer" Status.

Alabama's decision to exempt motor carriers from sales and use tax on diesel—for the entirely sensible reason that they pay a *different* tax that is "substantially similar" in burden, Pet App. 57a—presents no risk that the State is trying to soak the railroads for a disproportionate share tax revenue. With the decision below, CSXT has taken what

Congress intended as a shield against exploitation of interstate carriers and turned it into a sword by which to obtain treatment *more* favorable in comparison to both its motor carrier competitors and Alabama taxpayers generally. They have, in other words, achieved the "most-favored-taxpayers" status that this Court expressly recognized was not the goal of Section 11501. *CSX*, 131 S. Ct. at 1109 n.8.

The Eleventh Circuit could have—and should have—avoided granting CSXT (and other railroads) most-favored-taxpayer status by following the suggestion of Justices Thomas and Ginsburg to focus the inquiry under Section 11501(b)(4) on whether "a tax exemption scheme * * * target[s] or single[s] out railroads *by comparison to general commercial and industrial taxpayers*." *Id.* at 1115 (Thomas, J., dissenting) (emphasis added). Its erroneous decision to instead compare CSXT's treatment only to that of its competitors—and to narrowly focus only on the challenged tax without considering whether their overall tax treatment was even-handed—turns the purpose of Section 11501(b) on its head, at great cost to fair play and competition among interstate transportation industries.

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, the decision below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a non-profit trade association of interstate railroads.[1] AAR represents its members before courts, agencies and the Congress in matters of common concern.

AAR's members own and operate major rail systems, regional railroads and short lines. They carry almost all of the Nation's rail freight and employ almost all of its railroad workers; their lines also are used to provide passenger and commuter service in many areas.

Interstate transportation of commodities by rail is critical to the economy. Railroads were one of the first instrumentalities of interstate commerce and continue to be one of the most important. The materials and products they move generate economic activity at origins and destinations throughout the Nation. The industrial, mining and consumer goods sectors, among others, rely heavily on rail transport. And the railroads' ability to invest in expanded and

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[1] Petitioners and Respondent have consented to the filing of this brief in blanket consents that have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part. The only monetary contribution intended to fund the preparation or submission of this brief made by a party or its counsel is through a special assessment on the AAR members that are Class I Railroads (the seven largest railroads), of which Respondent CSX Transportation, Inc. ("CSXT") is one. No person other than the *amicus curiae*, its members or its counsel made a monetary contribution intended to fund this brief.

The full roster of AAR's members and affiliate members is available on AAR's website. AAR Members Across the Globe, Ass'n of Am. R.R., https://www.aar.org/Pages/AboutUs.aspx?t=aarmembers (last visited Nov. 4, 2014).

improved facilities to serve their customers is key to economic growth on national, regional and local levels.

The capital-intensive systems over which rail service is provided are owned and maintained by the railroads themselves. By contrast, motor carriers operate on tax-funded public highways and are a disproportionate cause of wear-and-tear damage to those motorways.

In addition to the Class I and regional carriers, there are more than 500 short-line, switching and terminal companies.[2] Almost all of those smaller railroads handle shipments destined for or coming from other states, and thus also are engaged in interstate transportation. *See, e.g.*, *Atl. Coast Line R.R. Co. v. Standard Oil Co.*, 275 U.S. 257, 268 (1927).

Because the U.S. rail industry operates from, to and across multiple states, it is subject to a variety of state and local taxes. The seven Class I railroads alone pay state and local taxes of more than $1.7 billion annually.

To ensure that the taxes states impose on these vital instrumentalities of nationwide commerce are not discriminatory—as they often had been in the past—Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). Pub. L. No. 94-210, § 306, 90 Stat.

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[2] *See* Ass'n of Am. R.R., *Railroad Facts* 3 (2013) (Consist of Industry); U.S. Surface Transp. Bd., *FY 2012 Annual Report* 71 (2014), *available at* http://www.stb.dot.gov/stb/docs/AnnualReports/STB%20FY2012%20AR%20Final%201-7-14.pdf.

31, 54 (1976) (codified as amended at 49 U.S.C. § 11501 (2012)).[3] That statute bans four specified "acts" of state and local taxation. 49 U.S.C. § 11501(b). The first three relate solely to property taxes. *Id.* § 11501(b)(1)-(3). The fourth prohibits "another tax that discriminates against a rail carrier." *Id.* § 11501(b)(4).

AAR and its members were deeply involved in the extensive legislative process that culminated in section 11501, during which Congress studied the history of discriminatory state taxation of railroads and its damaging effects. *See, e.g.*, S. Rep. No. 94-499 (1975), *reprinted in* 1976 U.S.C.C.A.N. 14; H.R. Rep. No. 94-725 (1975). It is critical—not only for them but also for the many producers and consumers throughout the Nation who rely on rail service—that the 4-R Act continue to serve the goal Congress intended: to eliminate state tax discrimination against railroads in *any* form.

Congress enacted section 11501 to impose bright-line rules against discrimination. It did so as an affirmative exercise of its power under the Commerce Clause, expressly declaring that each of the four specified acts of taxation "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). But even that has not eliminated the problem.

The constant incentive for states to seek more tax revenue has required continuous vigilance to ensure

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[3] Recodification did not make any substantive change in the statute. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1105 n.1 (2011) ("*CSXT I*").

that judicial interpretations of section 11501 adhere to the clear requirements of its text. The decision below did so, recognizing the structural protections Congress designed this important statute to erect for the benefit of the entire national economy. AAR accordingly submits this brief *amicus curiae* in support of Respondent CSXT.

SUMMARY OF ARGUMENT

Section 11501(b)(4) broadly prohibits states from imposing "another tax" that discriminates against interstate rail carriers. Congress added subsection (b)(4) after articulating special requirements for dealing with one particular type of discrimination, involving property taxes. The text and structure of the statute demonstrate this "catch-all" is not subject to those same requirements. That is the conclusion this Court reached in *CSXT I*.

There consequently is no basis for restricting the analysis of discrimination under subsection (b)(4) to a "comparison class" of commercial and industrial taxpayers. Any comparison class that is relevant to the tax challenged and the discrimination claimed may be used.

"Competing modes of transportation" is one such class. Whether a state tax discriminates against rail carriers as compared to the motor, water or air carriers that compete with them goes to the heart of a problem the 4-R Act was enacted to remedy: imbalances in governmental support favoring other modes to the severe detriment of the rail industry. Congress expressly sought to restore competitive

balance in order to return railroads to financial stability and protect their long-term health as a vital component of the Nation's transportation system.

A competitive class of competing modes was the appropriate one here. And because it does not apply to motor carriers or water carriers, Alabama's sales and use tax on diesel fuel discriminates against interstate rail carriers on its face.

That discrimination cannot be justified or excused by looking to Alabama's separate and distinct motor fuel excise tax. The text of section 11501(b)(4) neither contemplates nor permits consideration of taxes other than the one challenged. Even if it did, the motor fuel tax—which is a *quid pro quo* usage charge designed to pay for the benefit of public roads over which motor carriers conduct their business—could not be considered an equivalent to a general revenue measure like the sales and use tax on the privilege of selling or using goods. The history and structure of the motor fuel tax make that plain, as does the 4-R Act legislative history demonstrating Congress understood this full well.

In any event, Alabama's motor fuel tax does not apply to water carriers and therefore cannot justify Alabama's discrimination in their favor under the sales and use tax. That alone is sufficient to establish a violation of section 11501(b)(4).

The court below correctly decided both questions presented here. Its judgment should be affirmed, and Alabama's collection of the sales and use tax on interstate rail carrier diesel fuel enjoined. That result properly applies the terms of this important

statute and respects the goals Congress sought to achieve by enacting it.

ARGUMENT

I. THE SECTION 11501(b)(4) COMPARISON CLASS MUST BE APPROPRIATE TO THE CLAIM

The court of appeals held that whether Alabama's sales and use tax on diesel fuel discriminates against railroads should be evaluated by looking to how the same tax treats diesel fuel used by their principal competitors—motor and water carriers. Pet. App. 7a-12a. As both CSXT and the United States show, that comparison class of competing transportation modes is compelled by the statute given the nature of the discrimination challenged here. *See* Resp. Br. 13-29; Br. for the United States ("U.S. Br.") 12-21. Alabama's arguments to the contrary, Pet. Br. 21-50, cannot be squared with the text of Section 11501, the clear objectives Congress expressed in crafting it or this Court's recent decision in *CSXT I*.

A. *CSXT I* Makes Clear that Section 11501(b)(4) Is Not Restricted to the "Commercial and Industrial Property" Comparison Prescribed in Subsections (b)(1)-(3)

This Court carefully analyzed the relationship of subsection (b)(4) to subsections (b)(1)-(3) in *CSXT I*, 131 S. Ct. at 1110-14. That analysis forecloses Alabama's comparison class arguments.

Alabama contends that the "other commercial and industrial property" benchmark prescribed in sections 11501(b)(1)-(3) for determining whether *property* taxes discriminate must be imported into section 11501(b)(4). *See* Pet. Br. 25-27. It made much the same structural claim previously, arguing that as a matter of statutory construction this Court should "read[] into § 11501(b)(4) every limitation contained in §§ 11501(b)(1)-(3), including the exclusion of tax exemptions from the class of state actions subject to challenge." *CSXT I*, 131 S. Ct. at 1113 (citation omitted).

The Court rejected that analysis, noting subsection (b)(4) "is 'one of . . . several distinct and independent prohibitions.'" *Id.* (citation omitted) (omission in original). It went on to explain that "[r]eading subsection (b)(4) to cover non-property tax exemptions will not deprive subsections (b)(1)-(3) of effect, because those subsections are addressed only to property taxes. A canon ["*ejusdem generis*"] meaning literally 'of the same kind' has no application to provisions directed toward dissimilar subject matter." *Id.*

That conclusion leaves "other commercial and industrial property" where it should be, as a standard for *property* tax discrimination under subsections (b)(1)-(3). It also properly respects the manifest decision of Congress *not* to prescribe "commercial and industrial property" or any other comparison class for determining whether there is discrimination under subsection (b)(4).

Looking to the statutory text, this Court has explained:

> Congress wrote the statute it wrote, and that statute draws a sharp line between property taxes and other taxes. Congress drafted §§ 11501(b)(1)-(3) to exclude tax exemptions from the sphere of prohibited property tax discrimination. But it drafted § 11501(b)(4) more broadly, *without any of the prior subsections' limitations*, to proscribe other "tax[es] that discriminat[e]," including through the use of exemptions.

CSXT I, 131 S. Ct. at 1114 (emphasis added) (alterations in original). That omission must be considered intentional and cannot be undone by construction. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

This means discrimination under subsection (b)(4) must be approached the same way courts assess it in a variety of other settings, as "the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'" *CSXT I*, 131 S. Ct. at 1108 (citations omitted). Alabama's claim that the very concept of discrimination is limited to what would be discriminatory under subsections (b)(1)-(3) or former section 13(4) of the Interstate Commerce Act, *see* Pet. Br. 23-29, is precluded by this Court's prior decision.

B. The Legislative History Confirms Congress Intended Section 11501(b)(4) to Reach Discrimination Favoring Competitors, Including Trucks

Alabama invokes snippets of legislative history to contend the statute should be read contrary to its text, its structure and *CSXT I*. *See* Pet. Br. 30-38. The materials Alabama cites cannot bear the weight placed on them. To the contrary, the legislative history confirms the appropriateness of a competing modes analysis when viewed as a whole in its historical context.

Alabama argues from statements in testimony and committee reports that Congress only intended to protect railroads from discrimination favoring other business taxpayers at large, not discrimination favoring their direct competitors. In its view, comments to the effect that railroads should not be treated worse than local taxpayers and that railroads were not seeking favored status somehow restricted the statute's reach so that only the largest possible comparison class can apply. *See id.* at 30-33.

But as is plain from the vintage of the comments Alabama cites—the earliest from 1961 and the latest from 1972—they have nothing to do with subsection (b)(4), as the bills being considered at those times did not contain the "catch all."[4] Those comments may make sense with respect to subsections (b)(1)-(3),

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[4] Subsection(b)(4) was added in 1975. *See, e.g., Ala. Great S. R.R. Co. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981); *see also* S. Rep. No. 94-499, at 65.

whose text prescribes a broad comparison class, but they have no relevance to the provision at issue here.

The same is true regarding Alabama's backward logic that section 11501(b)(4) cannot be read to prohibit discrimination in favor of motor carriers because "[t]he truckers thought the 4-R Act was a shield against local taxpayers, not a sword for the railroads to attack their competitors' tax preferences." Pet. Br. 34. Alabama admits early proposals that had included interstate motor carriers and water carriers were narrowed later in the legislative process, yielding a law that covers only railroads. *Id.* That focus reflected not only the rail industry's dramatic collapse but also the fact that discriminatory state taxation of interstate carriers fell overwhelmingly on railroads. One congressional study concluded that railroads bore more than 80% of all state tax discrimination, with the remainder spread across "oil pipelines, common and contract motor carriers, motor bus companies, water carriers, and freight forwarders." S. Rep. No. 90-1483, at 2 (1968); *see also* S. Rep. No. 91-630, at 3 (1969).

It also bears noting that during the period in which section 11501 was being considered, the trucking business was far more local in character than today. Regulatory reforms, including the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, facilitated expansion and consolidation of local motor carriers into larger enterprises. *See, e.g.*, Interstate Commerce Commission, *1981 Annual Report* at 43-44, 50-52 (1982).

The argument Alabama presses most strenuously is that subsection (b)(4) must ignore discrimination

in favor of railroad competitors because Congress expressed a need to level the playing field with "local" taxpayers who can exercise political influence. *See* Pet. Br. 31-33, 35-38. This Court has already rejected that argument:

> [T]he text of § 11501(b) tells a different story. Consistent with the Act's purpose of restoring the financial stability of railroads (not of interstate carriers generally), *supra*, at 1105, each of subsection (b)'s provisions proscribes taxes that specially burden a rail carrier's property or otherwise discriminate against a rail carrier. . . . The distinctions drawn in § 11501(b) are not between interstate and local actors, as the State contends, but rather between railroads and other actors, whether interstate or local.

CSXT I, 131 S. Ct. at 1109.

While Alabama's arguments evaporate, section 11501's lengthy legislative history provides extensive and compelling support for CSXT. It emphatically confirms that a comparison class of competing modes is both permissible under subsection (b)(4) and appropriate in this case.

Following the Second World War, the Nation's rail industry suffered an extended decline. Several forces played major roles in causing that damage. Federal regulation by the Interstate Commerce Commission was extremely burdensome, competition from motor carriers grew enormously—facilitated by construction of the Interstate Highway System

beginning in 1956—and many states engaged in discriminatory taxation on interstate railroads.

For two decades leading up to passage of the 4-R Act in 1976, Congress studied the causes of the rail industry's financial distress as well as potential remedies. *See, e.g.*, S. Rep. No. 94-499, at 14; H.R. Rep. No. 94-725 (1975); Discriminatory State Taxation of Interstate Carriers, S. Rep. No. 91-630 (1969); Special Study Group on Transp. Policies in the U.S., Sen. Comm. on Commerce, Nat'l Transp. Policy, S. Rep. No. 87-445 (1961) (the "*Doyle Report*"). The *Doyle Report* detailed the problems and advanced recommendations for congressional review. It addressed a wide range of substantive issues, including regulation, competition and state taxes.

But Congress did not act at the time, so the damage continued until the railroads faced collapse. Private-sector solutions failed: while some railroads sought mergers to achieve efficiencies, ICC review was so protracted and encrusted with special interest considerations that even when finally consummated, combinations provided no relief. Most famously, the Pennsylvania Railroad and the New York Central Railroad applied for approval to merge in March 1962, obtained authorization to create Penn Central Transportation Company in early 1968—subject to numerous conditions, among them inclusion of the New York, New Haven & Hartford Railroad—and declared bankruptcy in June 1970. *See generally* Joseph R. Daughen & Peter Binzen, *The Wreck of the Penn Central* (1st ed. 1971); *see also Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 494-97 (1968).

The failure of the Penn Central and the ensuing transportation crisis spurred legislative reforms at last. In 1973, Congress passed the Regional Rail Reorganization Act, Pub. L. 93-236, 87 Stat. 985, which created Conrail to own and operate properties of bankrupt lines. Three years later followed the 4-R Act, which in addition to banning discriminatory state taxation of interstate railroads reduced many regulatory barriers. Finally, in 1980, Congress made even more sweeping reforms to railroad regulation in the Staggers Rail Act, Pub. L. 96-448, 94 Stat. 1895.

Several related concerns important to this case are evident in this prolonged process of legislative scrutiny and action. First, Congress recognized that one of the key problems railroads faced was competition from motor carriers. Second, Congress fully understood that because motor carriers operate on public highways, they enjoy substantial government support that railroads do not. Third, from the outset Congress knew that motor carrier fuel taxes are in the nature of usage charges—paying for the benefits of conducting business on public roadways and funding their maintenance and improvement.

The 4-R Act's principal focus was to eliminate government-created imbalances that had prevented railroads from competing effectively with motor carriers and water carriers. The Senate Report on the bill ultimately enacted began by noting that it was designed "to allow railroads to compete with other modes of transportation." S. Rep. No. 94-499, at 1. The same report emphasized the imbalance in federal funding for the various modes of

transportation in the early 1970s, with motor carriers having benefited from over $20 million *annually* for highways and water carriers from approximately $16 million for waterways. *Id.* at 2-3. By contrast, railroads received only nominal federal support—almost all to address "emergency, not long term, needs." *Id.* at 3.

At the same time, the railroads continued to be subject to the heavy-handed regulatory regime established when they had a virtual monopoly on interstate transportation. Competing motor carriers and water carriers enjoyed a far lighter regulatory regime. Indeed, as of the early 1970s, only seven percent of the commodities that moved by water carrier were subject to any federal regulation at all. H.R. Rep. No. 94-725, at 54.

This "clearly uneven treatment" led Congress to pare back interference in such key areas as railroad rates, line abandonments and mergers, reforms that were designed to allow railroads to compete more effectively with motor and water carriers. *See* S. Rep. 94-499, at 13-14. In conjunction with those federal transportation policy reforms, Congress also acted to prevent the states from undermining them. It added a new provision to the Interstate Commerce Act that gave the ICC exclusive power to prescribe *intra*state rates if a railroad had sought to bring them into conformity with interstate rates but a state regulatory agency had not acted on that proposal within 120 days. *See* 4-R Act § 210 (adding former section 13(5) of the Interstate Commerce Act). It also added what became section 11501, which the final legislation expanded beyond property taxes to

prohibit "any other tax" that discriminates against railroads.

Given this context, it would be anomalous indeed for that prohibition to be interpreted as precluding a comparison class of competing modes. Enabling railroads to compete more effectively with trucks and water carriers was part of the bedrock underlying the entire 4-R Act.

Finally, it was clearly understood from the outset that part of the imbalance in states' treatment of railroads as compared to their principal competitors stemmed from the very different character of motor carrier fuel taxes. The *Doyle Report* described state taxes on motor fuel as "user charges on Government provided way" and "user charges imposed on competitive carriers [*i.e.*, motor carriers] for the use of other 'highways of commerce.'" S. Rep. No. 87-445, at 449-50; *see also id.* at 185-86 (describing "state highway user taxes," including "motor fuel taxes"). That perspective remained in focus throughout the legislative process: in the Senate debate on the final bill, Senator Hartke noted that "[t]he motor carriers and water carriers, the chief competitors of the railroads, pay only user taxes, or in the case of the water carriers, no tax for use." 121 Cong. Rec. 21041 (daily ed. Dec. 4, 1975) (Statement of Sen .Vance Hartke).

Congress fully understood that state motor fuel taxes were part of a *quid pro quo*, in which motor carriers receive enormous competitive benefits not given to railroads. The significance of that distinction to the alleged comparability of taxes on railroad and truck fuel is addressed below, but it also

was recognized as an element in the competitive imbalance section 11501 was designed to redress.

Against this legislative background, the use of competing transportation modes as the comparison class under section 11501(b)(4) is wholly consistent with the objectives of Congress as well as the text and structure of the statute. Taxes that disadvantage railroads *vis-à-vis* their principal competitors are yet another form of imbalanced governmental action favoring one mode to the detriment of another. Rather than leaving railroads with the short end of the stick, which had led to disastrous results, Congress acted to eliminate such imbalances so that railroads would be—and remain—competitive with motor carriers and water carriers. The "competing modes" comparison class achieves that end.

C. A Competing Modes Comparison Class Has Proven Workable

Alabama's other arguments on the comparison class issue, Pet. Br. 38-44, are makeweights. They conjecture that water carriers might have negligible competitive influence in some states but not others, suggesting the results of section 11501(b)(4) claims might vary state to state. *Id.* at 39. But any such variability simply reflects how discrimination is evaluated on the facts of each case, by determining whether "the groups are similarly situated" and whether "there is no justification for the difference in treatment." *See CSXT I*, 131 S. Ct. at 1109. In any event, the parties stipulated that interstate water carriers are among CSXT's "principal competitors" in

Alabama. *See* JA 28 ¶ 10. That is plainly so, as the state has major Gulf shipping ports on Mobile Bay that connect to numerous points hundreds of miles north via navigable rivers and the federally funded Tennessee-Tombigbee Waterway. Alabama fares no better with its unfounded speculation that railroads might someday cease to compete with trucks. *See* Pet. Br. 39-40.

A comparison class of competing modes is neither unworkable nor unfair. Numerous federal and state courts have applied it. *See, e.g., Union Pac. R.R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695-96 (8th Cir. 2007); *Burlington N. Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985-86 (8th Cir. 1999); *Burlington N. R.R. Co. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892, 897-99 (M.D. Tenn.), *appeal pending*, No. 13-6348 (6th Cir. filed Oct. 16, 2013); *Kan. City S. Ry. Co. v. Bridges*, No. Civ. A. 04-2547, 2007 WL 977552, at *7 (W.D. La. Mar. 30, 2007); *Burlington N. R.R. Co. v. Triplett*, 682 F. Supp. 443, 445-46 (D. Minn. 1988); *Burlington N. R.R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551, 553-54 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338, 346 (Iowa 1983).

The members of the comparison class have been determined based on the facts; as the Eighth Circuit put it, "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." *Lohman*, 193 F.3d at 986 (footnote omitted). This does not mean the comparison class analysis has been "shifting" or illogical. If a tax can be shown to be discriminatory using a broader

comparison, it may not be necessary to address a narrower class; and in some cases—unlike here—the treatment of railroad competitors may not be relevant to the discrimination claimed. As the United States explains, a "flexible approach" that starts with what is alleged in the complaint is appropriate for enforcing the discrimination standard Congress enacted. *See* U.S. Br. 18-19. It is the fact of discrimination, not the number of comparison class members, that controls.

II. THE FACT THAT ALABAMA DOES NOT TAX WATER CARRIER FUEL AT ALL VIOLATES SECTION 11501(b)(4) ON ITS FACE

Alabama imposes no sales and use tax on diesel fuel used by interstate water carriers. *See* Pet. App. 3a, 17a; Pet. Br. 5-6, 8. Because water carriers are part of the proper comparison class for determining whether that tax discriminates against interstate railroads, this alone establishes a violation of section 11501(b)(4).

Alabama cannot justify discrimination in favor of water carriers. Water carriers are not subject to the motor fuel tax, nor does the state even suggest there is any potential compensating or offsetting tax. The most Alabama claims is that interstate waterways are somehow constitutionally unique. *See* Pet. Br. 8-9, 57-59. As CSXT shows, that claim is both anachronous and irrelevant. *See* Resp. Br. 52-53.

Alabama's discrimination against railroads in favor of water carriers is sufficient in and of itself to

affirm the decision below. Perfect discrimination between railroads and all members of the comparison class is not necessary; it is enough that one competing mode receives preferential treatment. *See Union Pac.*, 507 F.3d at 696 (holding section 11501(b)(4) is violated even if some (but not all) members of a comparison class are taxed the same as railroads).

III. THE CHALLENGED TAX ITSELF IS THE SOLE BASIS ON WHICH TO ASSESS DISCRIMINATION

Consistent with the decisions of all other courts of appeals that have addressed the issue, the court below held that only the tax challenged—and not allegedly offsetting or compensating taxes on motor carriers—can be considered in determining whether there is discrimination in violation of section 11501(b)(4). Pet. App. 12a-17a. That was the correct reading of the statutory text and is fully consonant with what Congress sought to achieve by enacting it.

Alabama contends that states should be able to impose a tax on a railroad but not its competitors so long as the competitors are subject to other taxes and there is some rational basis for taxing the modes differently. *See* Pet. Br. 44-46, 49. The United States argues that courts should be required to consider an allegedly "comparable" tax that "falls on the same taxable item." U.S. Br. 26. Neither claim can be reconciled with the statute or its objectives.

A. Section 11501(b)(4) Expressly Limits Analysis to the Tax Being Challenged

All of the courts of appeals to consider the issue have held that the discrimination created by a tax imposed on railroads but not on members of a "competing modes" comparison class cannot be justified by other taxes on those competitors. That has been the case whether the purported justification is a single allegedly comparable tax or the state's entire tax system. *See, e.g.*, Pet. App. 12a-17a (single tax); *Union Pac.*, 507 F.3d at 695 (single tax); *City of Superior*, 932 F.2d at 1186-88 (tax system); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991) (tax structure); *Kan. City S. Ry. Co. v. McNamara*, 817 F.2d 368, 376-79 (5th Cir. 1987) (single tax and tax structure); *Gen. Am. Transp. Corp. v. Kentucky*, 791 F.2d 38, 40-42 (6th Cir. 1986) (tax structure); *Burlington N. R.R.*, 509 N.W.2d at 554 (tax structure). In all of these cases, the discrimination analysis was strictly limited to the challenged tax.

Alabama did not seek review of this uniform rule. It is before the Court only at the suggestion of the United States, which did not participate in any of the lower court cases that studied and adopted it.

The rule that only the challenged tax can be considered, and that discrimination cannot be justified by looking to any other tax, should be affirmed. That rule is firmly grounded in the text of the statute, serves the statute's objectives and avoids a number of problems that would be created under the approach Alabama and the United States urge.

Section 11501(b)(4) states that "another tax"—that is, a tax in addition to the property taxes dealt with in subsections (1)-(3)—can be challenged; the controlling text prior to recodification makes this even more clear, prohibiting "the imposition of 'any other tax' that discriminates against a railroad." *See CSXT I*, 131 S. Ct. at 1107 n.6 (citation omitted).

In either case, the sole focus of the statutory text is a single tax—the challenged tax. And in neither case did Congress say courts should look beyond that specific challenged tax to determine whether it is discriminatory. Congress could have directed courts to consider comparable taxes or a state's entire tax structure when assessing discrimination, but did not.

The words Congress enacted are singular and unambiguous, which should be enough to put an end to the inquiry. To suggest the broadest possible comparison is made necessary by the need for the tax to "discriminate," *see* Pet. Br. 22-24; U.S. Br. 22-27, is sheer bootstrapping, at odds with the text.

This Court has held that to "discriminate," as that term is used in subsection (b)(4), is to treat similarly situated groups differently without a justification for the difference in treatment. *CSXT I*, 131 S. Ct. at 1108-09. There is no logical reason why the possibility of a justification would necessarily require reference to exogenous taxes.

Respecting the decision Congress made to confine the inquiry to the singular "any tax" or "another tax" being challenged is also consistent with this Court's decision in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979). *See Trailer Train*, 929 F.2d at 1302-

03; *McNamara*, 817 F.2d at 377-78. As here, *Snead* arose under a federal statute expressly prohibiting state tax discrimination, not the dormant Commerce Clause. And the statute in *Snead* parallells the text of subsection (b)(4); indeed, it was enacted by the same Congress in the same year.[5] It provided: "No State, or political subdivision thereof may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." 441 U.S. at 146 (internal quotations and citation omitted). Like section 11501(b)(4), it applied to all states and localities and prohibited a "tax" in the singular.

The state sought to justify a specific electrical generation tax on out-of-state entities by looking beyond the challenged tax and considering allegedly "offsetting" effects of the state's gross receipts tax on in-state entities selling electricity. 441 U.S. at 149-50. This Court rejected that argument:

> To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against

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[5] *Snead* involved a provision of the Tax Reform Act of 1976. *Snead*, 441 U.S. at 146 (citing Tax Reform Act of 1976, Pub. L. No. 94-455, § 2121(a), 90 Stat. 1914 (codified at 15 U.S.C. § 391 (2012))); *see also CSXT I*, 131 S. Ct. at 1105 (citing 4-R Act, Pub. L. No. 94-210, § 101(a), 90 Stat. 31, 33).

> electricity sold outside New Mexico, it violates the federal statute.

Id. (footnote omitted).

The statute in *Snead* prohibited discriminatory taxes on electricity; section 11501(b)(4) prohibits discriminatory taxes on railroads. In each case, Congress specified the object of the discrimination it prohibited and making the "tax *itself*" the sole focus of inquiry. Just as the gross receipts tax on in-state utilities was irrelevant in *Snead*, so is the motor fuel tax on trucks and water carriers irrelevant here.[6]

The United States attempts to dismiss *Snead* in a lengthy footnote. *See* U.S. Br. 26 n.9. But it is wrong in suggesting that when Congress bans any discriminatory tax on specific activities in interstate commerce—electrical transmission and generation—it is being more exact than when it bans any discriminatory tax on specific instrumentalities of such commerce—interstate rail carriers. And its effort to distinguish the gross receipts tax in *Snead* from the motor carrier fuel tax here assumes rather than demonstrates that the latter is equivalent to the challenged tax but the former was not. Finally, its argument that the *Snead* statute was directed at a specific state law is beside the point. Congress did not write that statute to reach a single, identified

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[6] The statute in *Snead* arguably gave greater leeway to consider other taxes by defining discrimination as "a greater tax burden on electricity which is generated and transmitted in interstate commerce than . . . in intrastate commerce." 441 U.S. at 146. Section 11501(b)(4) contains no such definition and no suggestion of any "burden" analysis.

measure; instead, it used general language to prohibit a form of discrimination by any state at any time. In any event, legislative motive cannot override statutory text.

There are compelling reasons for confining the discrimination inquiry under section 11501(b)(4) to the challenged tax, as the statute and *Snead* require. Doing so provides clear and manageable limits for litigation, whereas a contrary rule would invite the open-ended inquiries into state tax regimes that the courts of appeals have rightly avoided. *See, e.g.,* Pet. App. 12a-16a; *McNamara*, 817 F.2d at 377-78. That is not merely a question of judicial resources: asking federal courts to weigh the effects of multifarious taxes would intrude into state tax policy far more than a cabined analysis of the challenged tax. By focusing on the challenged tax alone, subsection (b)(4) properly respects Federalism.

Alabama proposes to simplify matters by urging the Court to adopt a loose equal protection standard for justifying taxes that discriminate against interstate railroads. Pet. Br. 19, 49-50. Giving states that *carte blanche* to tax interstate railroads would of course be antithetical to the history and purpose of section 11501.

Absent that—and to avoid the mischief of unbounded inquiry—for other taxes to be considered, it would be essential for a state to prove them closely comparable to the tax under review. For a number of reasons the Alabama motor fuel excise tax demonstrably is not.

B. The Motor Fuel Tax Is a Charge for Use and Maintenance of Roadways, Which Cannot Be Equated with a General Revenue Tax on Railroad Diesel Fuel

While Alabama argues for broad state discretion in justifying discrimination against interstate rail carriers, the specific tax that they, the United States and Alabama's *amici* urge as a justification here is the state's excise tax on motor fuel. Their efforts to equate the motor fuel tax with the sales and use tax ignore fundamental differences in the nature and incidence of those two taxes.

The best proof these are non-comparable taxes is the fact that several states do not give motor carriers an exemption like Alabama's. That is, they impose *both* a motor fuel tax and a sales and use tax on diesel fuel purchased or used by motor carriers within the state.[7] This is not "double taxation," as Alabama and its *amici* suggest. *See* Pet. Br. 57; Br. for Am. Trucking Ass'ns, Inc. 3-5; Br. of Alabama Cities and Counties 22. It simply reflects the reality that motor carrier fuel taxes are designed to pay for using (and damaging) public roads, whereas sales and use taxes are general revenue measures.

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[7] Those states include: Illinois, 35 Ill. Comp. Stat. 105/3 (use tax), 35 Ill. Comp. Stat. 120/2-10 (sales tax), 35 Ill. Comp. Stat. 505/2 (diesel fuel use tax); California, Cal. Rev. & Tax. § 6051 (sales tax), §§ 60050 *et seq.* (diesel fuel tax); and New York, N.Y. Tax Law §§ 282-a to 282-c (diesel sales and use tax), § 523 (fuel use tax), § 1105 (sales tax), § 1110 (use tax).

Fuel excise taxes have a distinct history as a direct *quid pro quo*—a user charge. Revenue to construct and maintain public roads has traditionally been raised by collecting charges from the users of those roads. Tolls collected at entry points for major public roadways have been charged to maintain roads as far back as horse-and-wagon days. The "motor fuel tax" simply adapted this approach to the automotive age.

"[T]he motor fuel tax has been the mainstay of highway finance in the United States. This method has the advantage of being roughly proportional to the distance traveled and thus has the desirable attribute of being a pay-as-you-go form of user charge." David J. Forkenbrock & Paul F. Hanley, *Mileage-Based Road User Charges*, Public Roads, Mar./Apr. 2006 (Vol. 69, No. 5), *available at* http://www.fhwa.dot.gov/publications/publicroads/06mar/02.cfm. This usage-driven approach requires sellers of gasoline and other automotive fuels to collect a motor fuel tax at the point of sale and remit it to the state; the state then dedicates that revenue to road construction and maintenance. Its reach and ease of application are illustrated by the fact that within a decade after Oregon adopted the first motor fuel tax in 1919, similar measures had been passed in every state. *See* Jonathan Williams, *Paying at the Pump: Gasoline Taxes in America*, Tax Foundation Background Paper No. 56, Oct. 2007, at 3 tbl. 1, *available at* http://taxfoundation.org/sites/taxfoundation.org/files/docs/bp56.pdf.

This structure was soon reinforced at the federal level. The Hayden-Cartwright Act, Pub. L. No. 73-

393, 48 Stat. 993 (1934), required states to use their motor fuel tax proceeds solely for "the construction, improvement or maintenance of highways" (at least to the extent provided by their current laws) or risk the loss of federal highway construction aid. Pub. L. No. 73-393, § 12, 48 Stat. 993, 995.

From the outset, the "benefit concept"—the idea that those who use roads and benefit from them should pay for those roads in a manner more direct than under general revenue measures—has been central to the motor fuel tax. It continues to be a fundamental premise of both state and federal motor fuel tax programs.

Alabama's Motor Fuel Tax, first enacted in 1923, follows this user charge or benefits tax model. From its outset, virtually all proceeds went "into the construction and improvement of public roads and bridges." *See The Gasoline Tax in Alabama*, Tuscaloosa News, Mar. 2, 1939, http://news.google.com/newspapers?nid=1817&dat=19390302&id=ZOc-AAAAIBAJ&sjid=KU0MAAAAIBAJ&pg=4314,2787848.

The Alabama motor fuel tax at issue requires motor carriers to pay a total state tax of 19¢ per gallon on diesel fuel. Ala. Code §§ 40-17-2(1) (13¢ per gallon), 40-17-220(e) (6¢ per gallon). By Alabama law, the proceeds are dedicated exclusively to construction, repair and maintenance of the state's highways and roads. Ala. Code §§ 40-17-13, 40-17-146, 40-17-222.

Current federal law strengthens the tether between motor fuel taxes and motor carriers' actual

use of a state's roads. The Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. § 31705 (2012), prohibits states from charging a motor carrier fuel use tax unless they comply with the International Fuel Tax Agreement ("IFTA"), an interstate compact under which Alabama and other states redistribute motor carrier diesel fuel taxes according to highway usage reported quarterly by interstate motor vehicle operators to their home states. *See* International Fuel Tax Agreement, Arts. I, IX & X; JA 83-87.

Alabama's Department of Revenue is authorized to "collect any motor fuel taxes and fees due the members of the agreement . . . [and to] deposit taxes and fees collected into an escrow account, until the time as the taxes and fees can be distributed to the respective members." Ala. Code § 40-17-273. Alabama redistributes a portion of diesel fuel tax proceeds it collects under the motor fuel tax to other states to account for fuel purchased in Alabama but used elsewhere. *Id.* Alabama also receives tax proceeds from other states to account for motor carrier diesel fuel purchased outside of but used in Alabama, and it applies those funds to roadway construction and maintenance in the same way it does the revenues it collects under its motor fuel tax. *See* Ala. Code § 40-17-274.

Recent trends in automobile use provide fresh corroboration that the motor fuel tax is and has been a direct charge for the use of public roads. Hybrid vehicles and relatively high gasoline prices, among other things, have led to reduced automotive fuel use and hence reduced motor fuel tax revenues.

"[B]ecause petrol consumption was a rough proxy for road use, the system satisfied the principle that consumers should pay for a product in proportion to their use of it," but now that "petrol taxes no longer serve as an adequate stand-in for road use," some states are considering GPS-monitored mileage-based fuel taxes even for private automobiles. *See Roads Less Travelled*, The Economist, Oct. 19, 2013, *available at* http://www.economist.com/news/united-states/21588097-oregon-wants-tax-motorists-miles-driven-not-petrol-burned-will-it-work-roads-less. The unique character of motor fuel taxes as a charge for road usage, directly funding road construction and maintenance, could not be more clear.

Congress fully understood that unique character in crafting the reforms it adopted in the 4-R Act. It identified state motor fuel taxes as "user charges" and "highway user taxes" that fund roads, giving motor carriers substantial benefits. *See Doyle Report* at 185-86. Indeed, the *Doyle Report* showed how closely use and benefits are tied, describing the fact that a number of states charged a higher motor fuel tax rate for diesel than for gasoline (as Alabama does today):

> This tax rate difference [is] intended to reflect the fact that heavyweight, diesel-burning vehicles receive a greater highway ton-mileage per gallon of fuel consumed than do heavy-weight gasoline burning vehicles. Hence, the higher tax rate on diesel fuel is intended to make the tax payment of diesel-burning vehicles more commensurate with the highway benefits they receive.

Doyle Report at 186 (footnote omitted).

The sales and use tax is a different animal altogether. It is a classic general revenue tax, applicable to virtually all tangible personal property and designed to raise revenue that the state can apply to whatever purpose it deems appropriate.

Alabama's sales and use tax statute does not even mention diesel fuel. That simply falls within the general category of items subject to the tax and is not the object of any specific exemption. Ala. Code §§ 40-23-26(c), 40-23-60. The materials railroads use to maintain and improve their lines and other facilities in Alabama likewise are subject to the sales and use tax. *See* Resp. Br. 6 n.2.

Alabama can apply revenues generated by the sales and use tax to meet its general revenue needs, whether that be to offset revenue lost by homestead tax exemptions, to fund county governments, to support the State General Fund or for education. Ala. Code §§ 40-23-35 (disposition of sales tax revenue); 40-23-85 (disposition of use tax revenue). To the extent not used for other purposes, the residual sales and use tax revenue from all sources is presently applied to education. *Id.* § 40-23-35(f).

Railroads receive no special benefit from paying the sales and use tax—no revenue from that tax is dedicated to reinvestment in rights of way, lines or facilities for the taxpayer. Alabama's *amici* concede as much by arguing that the sales and use tax refund CSXT has sought for 2007 "could pay the salaries of fifty-five new teachers or forty-nine firefighters in Alabama." Br. of State & Local Gov't Orgs. 23

(citation omitted). By contrast, "the railroads acquire, construct, maintain and pay taxes on their own roads. . . . This gives the trucks a distinct competitive advantage." *Bair*, 338 N.W.2d at 347.

The arguments Alabama and its *amici* make for treating these very different taxes as the same thing are superficial at best. None addresses, let alone refutes, these fundamental distinctions.

Alabama simply ignores the history and legal structure that prove motor fuel taxes are a direct usage charge to fund public roads, very different from a general levy. Relying on the district court, it suggests the benefits motor carriers receive are "'due simply to the fact that the state must maintain the roads for the general public.'" Pet. Br. 14, quoting Pet. App. 58a-59a. That is wrong for any number of reasons. Due to their size and weight, large trucks cause disproportionate damage to—thereby creating the need for maintenance work on—those roads.[8] Many roads could be sized more modestly, and built less expensively, if trucks did not use them. And far from being a free good enjoyed in equal measure by both private motorists and trucks, those roads are

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[8] The Federal Highway Administration has estimated that interstate *automotive* travel costs 0.1¢ in pavement damage per mile, compared to interstate *truck* pavement damage costs as high as 12.7¢ per mile on rural interstate highways and 40.9¢ on urban ones. *See* U.S. Gen. Accounting Office, *Highway Infrastructure: Interstate Physical Conditions Have Improved, but Congestion and Other Pressures Continue*, Report to the Comm. on Transp. & Infrastructure, House of Representatives, GAO-02-571 at 46-47 (May 2002) (citing Fed. Highway Admin., Addendum to 1997 Federal Highway Cost Allocation Study, Final Report (May 2000)).

essential and extremely valuable to motor carriers' business operations.

Alabama also suggests that the railroads could avoid paying the sales tax on diesel fuel by the simple expedient of using clear (*i.e.*, undyed) diesel fuel in their locomotives. *See, e.g.*, Pet. Br. 55-56. Clear diesel is subject to the motor fuel tax instead of the sales tax.

That would simply compound the discrimination against the railroads. Not only would it require railroads to subsidize their competitors—since all money collected from the motor fuel tax goes to the Highway Fund—but all diesel subject to a state's motor fuel tax is also subject to the federal taxes earmarked for highways. 26 U.S.C. § 4081(a)(2)(A) & (B) (2012). The federal tax is presently 24.4¢ per gallon and, while there may be the potential to obtain a refund of the federal tax if the clear diesel is actually used for off-road purposes, that would involve a time-consuming process with no recompense to the railroads for their administrative costs or the time value of their money. The effect would be substantial, as U.S. railroads consume more than 3.5 billion gallons of diesel fuel annually. *See* Ass'n of Am. R.R., *Railroad Facts* 61 (2013) (showing annual rail diesel consumption of as much as 4.2 billion gallons over the past decade).

Alabama would receive an additional windfall from any clear diesel purchased by the railroads, since that would not be subject to the interstate compact under which motor fuel taxes paid by motor carriers are redistributed according to the mileage driven in each state. Alabama would keep *all* the

revenue from any tax a railroad might pay on clear diesel.

CSXT and the Tax Foundation explain in detail why, as a matter of law, the "compensatory tax" doctrine has no application here. *See* Resp. Br. 41-50; Br. of the Tax Found. 9-12. The background and structure of the motor fuel tax set forth above demonstrate that, as a matter of fact, it cannot be equated with the sales and use tax on diesel fuel.

Contrary to what the United States suggests, U.S. Br. 28, far more than "trivial differences in the structure of different states' tax codes" are at issue here. The unique history and structure of the motor fuel tax make that plain. And because motor fuel tax revenues are dedicated to build and maintain public roads essential to their business, that tax confers huge financial benefits on motor carriers. For any comparison to be made, those benefits would need to be taken into account as well. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 204-07 (1994); *see also Triplett*, 682 F. Supp. at 445-46 (citing *Bair*, 338 N.W.2d at 346); *Burlington N. R.R.*, 509 N.W.2d at 554 ("the use to which the collected tax revenues are put bears on whether or not the tax has a discriminatory effect on railroads").

The very purpose and design of the motor fuel tax—including such calibrated refinements as differentiated gasoline and diesel tax rates to reflect highway ton-mileage—suggest its net benefit/burden is at the least a wash for motor carriers; closer analysis in a particular case might well demonstrate it gives them a subsidy. In either event, that tax could not "offset" or "compensate" for the sales and

use tax railroads must pay on their diesel fuel. The result would only be to confirm that Alabama favors motor carriers, as well as water carriers, and discriminates against interstate rail carriers, just as the Eleventh Circuit concluded.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 5, 2014

AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, *ET AL.*,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Council On State Taxation ("COST") is a nonprofit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 multistate businesses in the United States, including rail carriers. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including this Court's prior review of this case, *CSX Transp., Inc., v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011), along with *Comptroller of the Treasury of Maryland v. Wynne, et ux.*, 431 Md. 147 (2013), *cert. granted*, 134 S. Ct. 2660 (U.S. May 27, 2014) (No. 13-485); *Direct Marketing Association v. Brohl*, 735 F.3d 904 (2013), *petition for cert. granted*, No. 13-1032 (U.S. Jul. 1, 2014); *Levin v. Commerce Energy*, 560 U.S. 413 (2010); and *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008).

While COST's membership includes the major rail carriers—which are directly impacted by the application and interpretation of Subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 49 U.S.C. § 11501(b)(4)—COST's broader membership is also concerned about the ramifications of this case. This Court's holding in this case could influence the validity and effectiveness of other federal laws protecting interstate commerce from discriminatory and unduly burdensome state taxation.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus's* intent to file this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

Amicus is concerned that if this Court looks beyond the challenged tax to evaluate discrimination, it will find a slippery slope. *Amicus'* membership has a vital interest in ensuring consistency in state taxation. Limiting judicial review to only the challenged tax when analyzing a federal law prohibiting state tax discrimination provides taxpayers with such consistency.

STATEMENT OF THE CASE

This is the second time this matter has come before this Court. The first time, this Court decided a railroad can use the 4-R Act to challenge a tax based on exemptions granted to its competitors, but did not decide the standard that should be used to determine when those taxes discriminate against rail carriers in violation of the 4-R Act.

The 4-R Act prohibits state and local taxing authorities from discriminating against rail carriers. Alabama imposes a sales and use tax on fuel used off-road. Ala. Code §§ 40-23-2(1) & -61(a). There are two major exemptions from these taxes relevant to this case: 1) fuel used on roads (imposed on motor carriers) that is subject to Alabama's motor fuel excise tax (Ala. Code §§ 40-17-325(a) & (b)); and 2) fuel used by interstate water carriers (Ala. Code §§ 40-23-4(a)(10) & -62(12)). Both motor carriers and water carriers serve the same purpose as rail carriers—carrying freight from place to place.

On April 14, 2008, CSX Transportation, Inc. ("CSX") filed this action against Alabama alleging the 4-R Act prohibits Alabama state and local taxing authorities from imposing sales and use taxes on CSX's fuel when exemptions from the State's sales and use tax are granted to motor carriers and interstate water

carriers. The district court dismissed the action, finding the 4-R Act does not support challenges to exemptions from sales and use taxes. *See Norfolk S. Ry. Co. v. Ala. Dep't of Revenue*, 550 F.3d 1306, 1314-15 (11th Cir. 2008). The Eleventh Circuit affirmed. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 350 F. App'x 318, 319 (11th Cir. 2009), *rev'd* 131 S. Ct. 1101 (2011).

This Court reversed and remanded, holding CSX could challenge Alabama's sales and use taxes as discriminatory under the 4-R Act; however, this Court did not decide if Alabama's sales and use tax system discriminated against rail carriers by exempting motor carriers and interstate water carriers. That issue was remanded back to the lower courts. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1114 (2011).[2]

On remand, the federal district court determined there was "no discrimination under the 4-R Act." *CSX Transp., Inc., v. Ala. Dep't of Revenue*, 892 F.Supp.2d. 1300, 1317 (N.D. Ala. 2012). The district court held that the appropriate comparison class was the narrower class comprising the rail carriers' direct competitors (*e.g.*, motor carriers and interstate water carriers), after observing that both parties had agreed that the "competing mode comparison is appropriate."

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[2] This Court stated that it was not addressing two issues: "First, Alabama contends that in deciding CSX's claim, a federal court must consider not only the specific taxes challenged, but also the broader tax scheme . . . Second, the State argues that the court must compare the taxation of CSX not merely to direct competitors but to other commercial entities as well. . . . But we leave these and all other issues relating to whether Alabama actually has discriminated against CSX to the trial court on remand to address as and when it wishes." *Id.* at 1107, fn. 5.

Id. at 1308. However, the district court ultimately ruled against CSX holding that the sales and use tax exemptions for the rail carriers' competitors did not constitute discriminatory taxation because the motor carriers were subject to a separate, but what it deemed similar, motor fuel excise tax.[3] *Id.* at 1313.

The Eleventh Circuit reversed the district court's decision holding that the Alabama sales tax violated the 4-R Act by exempting the rail carriers' competitors from the tax, and remanded the case with instructions to enter declaratory and injunctive relief in favor of the taxpayer. In so ruling, the Eleventh Circuit determined that the appropriate comparison class was the direct competitors of the rail carriers (*e.g.*, motor carriers and interstate water carriers) and that the State had not provided a sufficient justification for the exemptions. The Eleventh Circuit rejected the notion that the treatment of the rail carriers could be justified by extending the analysis outside of the sales and use tax arena. That court did not broaden its examination of the impact of the State's motor fuel excise tax imposed on motor carriers by comparing the State's overall tax scheme on rail carriers with other commercial and industrial businesses in the State. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 720 F.3d 863, 871 (11th Cir. 2013).

This matter is now back before this Court to determine whether Alabama's sales and use tax statute violates the 4-R Act's prohibition on discrimination against the rail carriers because Alabama's tax scheme provides exemptions for motor carriers and interstate water carriers from such tax.

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[3] The district court also held CSX failed to meet its burden to establish it had discriminatory taxation imposed on it based on the interstate water carriers' exemption from the State's sales and use tax on its fuel. *Id.* at 1316.

SUMMARY OF THE ARGUMENT

Amicus agrees with the Eleventh Circuit's ruling below. The appropriate comparison class is that of the rail carriers' competitors and not all commercial and industrial taxpayers. In addition, the appropriate test for determining whether a tax is discriminatory is the specific tax in question and not the overall taxes paid by one industry (*e.g.*, rail carriers) in comparison to another industry (*e.g.*, motor carriers). As this is an interpretation of a federal statute prohibiting discrimination, tests based on other constitutional provisions, such as the dormant Commerce Clause, are not relevant. However, tests based on other analogous federal non-discrimination provisions provide support for the conclusion that a discrimination inquiry is limited just to the disputed tax; it does *not* require a comprehensive examination of a state's overall tax structure.

ARGUMENT

I. THE APPROPRIATE COMPARISON CLASS UNDER 49 U.S.C. § 11501(b)(4) IN DETERMINING WHETHER A PARTICULAR TAX IS DISCRIMINATORY IS THE DIRECT COMPETITORS OF THE RAILROADS.

To determine if there has been discrimination against the respondent railroad in violation of the 4-R Act, the Court must first determine the appropriate comparison class under 49 U.S.C. § 11501(b)(4). The Eleventh Circuit decision below considered two possible classes: the broad class of all commercial and industrial taxpayers and the narrower class of direct competitors of the rail carriers (*e.g.*, motor carriers and interstate water carriers). As the court noted:

> Before we address whether the exemption at issue is discriminatory, there remains a first-order question that the Court left untouched and has yet to be answered in this circuit: against what do we compare the railroads? . . . If we compare CSX to all of the State's taxpayers, it is no worse off because most taxpayers pay the sales tax when they purchase diesel fuel. On the other hand, if we compare CSX to motor and water carriers, questions of favorable treatment arise because they do not pay the sales tax.

CSX, 720 F.3d at 867.

The Eleventh Circuit Court held that based on the language and statutory history of the 4-R Act, as well as an analysis of precedents in other Circuits, the appropriate comparison class is the narrower class of the rail carriers' direct competitors. *Id.* at 869.

The United States in its *amicus* brief in this case supporting neither party reached a similar conclusion: "[t]reating commercial and industrial taxpayers as the only possible comparison class for determining whether a state tax violates Section 11501(b)(4), as petitioners urge . . ., would be inconsistent with the statute's text and structure and would not fully effectuate Congress's purposes." Brief for the United States as Amici Curiae Supporting Neither Party at 12.

Amicus agrees with the decision below and the supporting analysis of the United States on this issue. To begin with, applying the rules of statutory construction to the wording of the 4-R Act supports CSX's position that the appropriate comparison class in this case is the direct competitors of the rail

carriers; it is not the broader class of all industrial and commercial taxpayers. The 4-R Act prohibits four different taxing practices that discriminate against rail carriers. 49 U.S.C. § 11501(b). The first three subsections of subsection (b) deal only with discrimination relating to property taxes and define the comparison class with references to "commercial and industrial" property. 49 U.S.C. § 11501(b)(1)-(3). For instance, (b)(3) says that states or localities may not "levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." *Id.*

By contrast, the language of the fourth subsection, which is the basis of this case, does not have any similar reference to "commercial and industrial" entities. It says that states or localities may not "impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." 49 U.S.C. § 11501(b)(4). As the Eighth Circuit noted in a 4-R Act case with striking similarity to this case, "[t]he rules of statutory construction dictate that words should not be supplied to a statute when the words are purposefully omitted or when adding words would defeat the purpose of the statute." *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 986 (8th Cir. 1999) *cert denied* 592 U.S. 1098 (2000). The omission of any reference to "commercial and industrial" taxpayers in the relevant provision of subsection (b)(4) clearly suggests that Congress did not intend that the comparison class for taxes, other than for property taxes, be constituted by this broader class of taxpayers.

Similarly, the analysis in the prior CSX case before this Court lends support to a reading of subsection (b)(4) that is entirely distinct from that of subsections (b)(1)-(3). While this Court declined to rule on the issue of the appropriate "comparison class" and remanded the issue to the federal district court, it did make a detailed analysis of the differences between these subsections relating to a different question. The Court addressed Alabama's contention that this Court's prior decision in *Dep't of Revenue of Or. v. ACF Industries, Inc.*, 510 U.S. 332 (1994) that prevented rail carriers from challenging property tax exemptions under subsection (b)(4), also extended more broadly to all non-property tax exemptions under subsection (b)(4). *CSX*, 131 S. Ct. at 1109-1114. After a lengthy analysis setting forth its disagreement with Alabama's interpretation of the *ACF Industries* case, this Court concluded:

> Congress wrote the statute it wrote, and that statute draws a sharp line between property taxes and other taxes. Congress drafted §§ 11501(b)(1)-(3) to exclude tax exemptions from the sphere of prohibited property tax discrimination. But it drafted § 11501(b)(4) more broadly, without any of the prior subsections' limitations, to proscribe other tax[es] that discriminat[e], including through the use of exemptions. That congressional election settles this case. Alabama's preference for symmetry cannot trump an asymmetrical statute. And its preference for the greatest possible latitude to levy taxes cannot trump Congress's decision to restrict discriminatory taxation of rail carriers.

Id. at 1114 (internal quotations omitted).

Finally, this narrower interpretation of the appropriate comparison class is consistent with the goal of the 4-R Act to "restore the financial stability of the railway system of the United States." *Id.* at 1109. It would ill serve the statutory intent of the 4-R Act if a claim of discrimination could be disregarded when direct competitors of the rail carriers are exempted from a state tax that applies to rail carriers simply because the tax also applies to other industrial and commercial businesses not in direct competition with the rail carriers.

To hold otherwise eviscerates the purpose of the 4-R Act and jeopardizes the application of many other federal acts providing protection against discriminatory taxation for particular industries. Congress in its role of nurturing interstate commerce has enacted statutes that impose modest limitations on state sovereignty in order to protect certain interstate businesses that are vulnerable to discriminatory state and local taxes. Along with the rail carriers (*e.g.*, the 4-R Act), these industries include: airlines;[4] energy generation;[5] motor carriers;[6] outer continental shelf oil and gas activities;[7] satellite service;[8] internet access;[9] and mobile telecommunications.[10] Each of these statutory provisions reflects a congressional intent to protect interstate commerce from undue burdens and from discriminatory state and local taxation. Each

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[4] 49 U.S.C. § 40116.

[5] 15 U.S.C. § 391.

[6] 49 U.S.C. § 14502.

[7] 43 U.S.C. § 1333.

[8] 14 U.S.C. § 152.

[9] 47 U.S.C. § 151.

[10] 4 U.S.C. §§ 116-126.

will benefit from a decision by this Court to ensure that discrimination is prohibited regardless of its form—whether by exemption or by statutory imposition.

II. THE FOCUS OF A 4-R ACT DISCRIMINATION SUIT SHOULD BE THE CHALLENGED TAX AND NOT THE STATE'S OVERALL TAX SCHEME.

Having determined the appropriate comparison class is the narrow class, the rail carriers' competitors (*e.g.*, motor carriers and interstate water carriers); *amicus* now turns to the question of whether this Court, in determining if there is discrimination, should look beyond the challenged tax to the overall taxes imposed by a state.

This Court previously reversed the Eleventh Circuit's decision and remanded the case back for the lower courts to determine if there was discrimination and, if so, to determine "whether and when dissimilar treatment is adequately justified." *CSX*, 131 S. Ct. at 1114. On remand, the Eleventh Circuit correctly and appropriately narrowed the examination to the specific discriminatory tax at issue, Alabama's sales and use tax on fuel. *CSX*, 720 F.3d at 869-870.

The key language in the catchall rail carrier discrimination provision of 49 U.S.C. § 11501(b)(4) is that a state may not "impose *another tax* that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." *Id.* (emphasis added). This provision speaks to a single tax, and the rules of normal statutory construction do not suggest that a comparison should be made to a

state's entire tax structure when determining if discrimination has occurred.[11] Alabama's tax structure on fuel thus equates to a discriminatory sales and use tax on the rail carriers. The rail carriers' competitors are subject to either another tax or to no tax: 1) the motor carriers are subject to an alternative motor fuel excise tax that can be lower depending on fuel prices and 2) interstate water carriers are exempt from both the motor fuel excise tax and Alabama's sales and use tax.

The quote below from *ACF Industries* explains the importance of the 4-R Act in protecting the rail carriers from parochial taxation:

> In the case before us, a state property tax is challenged under a federal statute, the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). . . . When drafting the legislation, Congress was aware that the railroads are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123 (1987) (quoting S.Rep. No. 91-630, p. 3(1969)). [Subsection (b) of 49 U.S.C. § 11501] addresses this concern by prohibiting the States (and their subdivisions) from enacting certain taxation schemes that discriminate against railroads. *See*

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[11] Alabama argues that the rail carriers' sales and use tax on fuel is a complementary tax, *see* Brief of Pet'r at 53. As addressed in f.n. 14 of this *amicus* brief, these taxes clearly are *not* complementary.

Burlington Northern R. Co. v. Oklahoma Tax Comm'r., 481 U.S. 454 (1987).

Id. at 335-36.

This Court should continue to be guided by the Eighth Circuit's decision in *Burlington Northern Santa Fe Railway Company v. Lohman*, 193 F.3d 984 (8th Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000), and the most recent decision in this case from the Eleventh Circuit. Both courts used a competitive mode analysis to see if those engaged in an identical activity are taxed differently. *Burlington Northern* at 986. This serves the "purpose of the catchall [provision] to prevent discriminatory taxation in any form and to cover a wide variety of taxing techniques." *Id.* Similar to CSX's fact pattern in this case, that court correctly held that Missouri's imposition of its sales and use tax on rail carriers, while exempting barges and trucks, was discriminatory under 49 U.S.C. § 11501(b)(4). The Eighth Circuit noted "a state's overall tax structure need not be examined under the 4-R Act . . . because the actual fairness of those arrangements is too difficult and expensive to evaluate." *Id.* (internal quotations omitted, quoting from *Kansas City Southern Ry. v. McNamara*, 817 F.2d 368 (5th Cir. 1987). The Eighth Circuit appropriately looked only at "the sales and use tax with respect to fuel to see if discrimination has occurred." *Id.* In addition, the Eleventh Circuit, when seeking sufficient justification from the State for the differential tax treatment of CSX's competitors, determined Alabama failed to meet that burden. *CSX*, 720 F.3d at 871.

Just as the Court noted in *Lohman*, trying to assess the actual "fairness" of the entire tax structure imposed on rail carriers versus other industries would be futile and lead one down a slippery slope.

How would comparisons be made between different taxes and different tax rates imposed on different industries? For example, what about differential property tax assessment rates that may be higher for some non-rail carriers? In addition, states often tax C Corporations differently than S Corporations (and other entities treated as pass-through entities) for income tax purposes. Should a majority rule be used for each respective industry class to determine if there is an overall discriminatory tax structure against the rail carriers under the 4-R Act? Next, how do the States' taxes and fees imposed on titling, registration or permits, which differ by industry and vehicle type, fit in the equation? How do local taxes, which differ locality to locality, fit in? Further, what is to be done with taxes based on what a purchaser paid (*e.g.*, sales and use taxes)? They vary based on time and location of the transaction, and by purchaser (*e.g.*, volume discounts). Are taxpayers discriminated against if their *total* state tax burden is lower when considering *all* of the state's taxes they pay (*e.g.*, income, sales, property, excise, etc.)?

This is just a partial listing of the problems inherent in Alabama's invitation. Determining the discriminatory effect of a state tax through a wholesale comparison to the entirety of a state's tax system would engage courts in the sort of speculative "adventitious considerations" regarding economic incidence and relative burdens of state taxes that this Court has squarely rejected. *Commonwealth Edison Co. v. Mont.*, 453 U.S. 609, 618 (1981), citing *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922). Use of the Eighth and Eleventh Circuits' "competitive mode" test avoids these outcomes.

Alabama's tax structure creates the onerous task of comparing an excise tax that varies based on price (*e.g.*, sales and use tax) with one that is imposed based purely on quantity (*e.g.*, Alabama's per gallon motor fuel excise tax). Because the sales and use tax imposed on rail carriers is greater than that imposed on its competitors (who are exempted from the tax), the mandates of the federal 4-R Act, specifically 49 U.S.C. § 11501(b)(4), prohibit the state from imposing that discriminatory tax—period.[12] Any comparative analysis will force the federal district courts to engage in economic speculation as to the harms suffered by the rail carriers from the imposition of a discriminatory tax that is subject to the 4-R Act. This is untenable.

III. TESTS BASED ON OTHER CONSTITUTIONAL PROVISIONS ARE NOT APPLICABLE TO THE FEDERAL 4-R ACT.

Because the 4-R Act is federal law prohibiting discrimination against rail carriers, case law under the Commerce Clause, Supremacy Clause, or another constitutional provision is *not* relevant in this case. The 4-R Act and constitutional protections provided to taxpayers are not analogous to each other. To hold otherwise would make the 4-R Act superfluous legislation.

This Court's test for determining whether a state tax violates the Commerce Clause under *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), is not controlling. Why? Regardless of whether intrastate

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[12] Rail carriers may also be involved in other non-rail carrier activities. It is a "red herring" to suggest that this fact makes it problematic to apply the 4-R Act. Quite simply, rail carriers' non-rail carrier operations are not subject to the protections of the 4-R Act.

or interstate commerce is favored, the federal 4-R Act prohibits the states from imposing *another tax* that discriminates against rail carriers. Unlike the Commerce Clause, which has "no iron rule of equality between taxes laid by a state on different types of businesses,"[13] Congress in enacting the 4-R Act specifically sought to protect rail carriers from such differential taxes. If there is a concern with the breadth of the 4-R Act, such concern is not for this Court to address; instead, Congress is the appropriate body to fashion a remedy (if warranted).[14]

This Court's approach to a Supremacy Clause case involving an alleged tax on the federal government reinforces this outcome. In *United States v. County of Fresno*, 429 U.S. 452 (1977) and later in *Washington v. United States*, 460 U.S. 536 (1983), the United States challenged taxes that were specifically designed to

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[13] *See State of Alaska v. Arctic Maid*, 366 U.S. 199 (1961) citing *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117, 119-21 (1941); *Morf v. Bingaman*, 298 U.S. 407, 414 (1936); and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-47 (1950).

[14] Even under the incorrect assumption that case law from the Commerce Clause is relevant, this Court's decision in *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996), disposes of the notion that the sales and use tax imposed on rail carriers (price based) and motor fuel excise tax imposed on motor carriers (quantity based) and the interstate water carriers (no tax) are compensatory taxes. Under *Fulton*, a compensatory tax must meet the following requirements: 1) identify the intrastate tax burden, 2) the tax on interstate commerce is roughly approximate, and does not exceed, the tax on intrastate commerce, and 3) both taxes are "substantially equivalent." *Id.* at 333, 344. Clearly, the tax imposed on CSX is not "roughly approximate" or "substantially equivalent" to that imposed on the motor carriers or the interstate water carriers because, at a minimum, the tax bases ("price" in the case of sales and use tax, and "quantity" in the case of motor fuel tax) are completely different.

avoid directly imposing a tax on the federal government. In both cases, the Court found there was no discriminatory effect because the federal government's tax treatment was not greater (and sometimes less) than businesses operating in the private sector. *Fresno* at 464-65, cited in *Washington* at 543. The Court held such taxes will be treated as valid if nondiscriminatory "until Congress declares otherwise." *Washington* at 540 (quoting *Fresno* at 460). In the present case, Congress has passed a law to protect rail carriers from discrimination and the intent of Congress regarding the 4-R Act should control, not case law based on areas of constitutional law where Congress has chosen not to act.

IV. LIMITING THE INQUIRY TO JUST THE CHALLENGED TAX IS CONSISTENT WITH OTHER FEDERAL NON-DISCRIMINATION LAWS.

Guidance from other analogous federal non-discrimination statutes is also relevant to this case. First, the Electricity Act, 15 U.S.C. § 391, prohibits discriminatory taxes on electricity sold to out-of-state entities.[15] *See Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979). Arizona argued that this Court when interpreting that Act should examine the overall tax structure to determine if Arizona, in fact, imposed

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[15] No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

a greater tax burden on electricity purchased by out-of-state entities.[16] This Court noted "the federal statutory provision is direct[ed] specifically at a state tax on or with respect to the generation or transmission of electricity, not to the entire tax structure of the State . . . To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." Snead at 149-50 (internal quotations omitted).

Next, the Eighth Circuit when addressing the Motor Carrier Act, 49 U.S.C. §14502,[17] which prohibits

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[16] The taxpayers, a group of utilities in neighboring states that received energy from New Mexico, sued, arguing that New Mexico's electrical energy tax was pre-empted by an analog to the 4-R Act. New Mexico responded by contending that no discrimination occurred within the meaning of section 391 under an "examination of New Mexico's total tax structure." *Snead* at 149.[16] The Court roundly rejected New Mexico's invitation to test discrimination by looking to a state's entire tax scheme.

[17] (a) Definitions.—In this section, the following definitions apply:

(1) Assessment.—The term "assessment" means valuation for a property tax levied by a taxing district.

(2) Assessment jurisdiction.—The term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) Motor carrier transportation property.—The term "motor carrier transportation property" means property, as defined by the Secretary, owned or used by a motor carrier providing transportation in interstate commerce whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135.

(4) Commercial and industrial property.—The term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes

taxing jurisdictions from subjecting motor carriers to a higher ratio of property taxation than other commercial and industrial property in a state, required personal and real property taxes to be considered separately. *See ABF Freight Sys., Inc. v. Tax Div. of Arkansas Pub. Serv. Comm'n*, 787 F.2d 292 (8th Cir. 1986). The Eighth Circuit rejected a motor carrier's argument that a uniform twenty percent assessment ratio on the assessment of personal property in the State was invalid because the overall assessment ratio in the State when using both real and personal property was not equal. The court held that the determination of whether there was an equal assessment was appropriately limited by the district court to personal property alone; it did not encompass both real and personal property. *Id.* at 298.

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or timber growing, devoted to a commercial or industrial use, and subject to a property tax levy.

(b) Acts burdening interstate commerce.—The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Excessive valuation of property.—Assess motor carrier transportation property at a value that has a higher ratio to the true market value of the motor carrier transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Tax on assessment.—Levy or collect a tax on an assessment that may not be made under paragraph (1).

(3) Ad valorem tax.—Levy or collect an ad valorem property tax on motor carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Most recently, the Supreme Court of Illinois addressed the proper comparisons for purposes of the Internet Tax Freedom Act, 47 U.S.C. § 151.[18] *Performance Mktg. Ass'n v. Hamer*, 998 N.E.2d 54 (Ill. 2013). That federal statute has a provision that prohibits states from imposing discriminatory tax on electronic commerce. Examining only Illinois' sales and use tax law, which imposed a collection obligation on out-of-state sellers that utilize in-state residents to facilitate sales by providing an Internet link to the seller's website, the Supreme Court of Illinois held that the discriminatory provision violated the federal statute. There was no review of Illinois' entire tax scheme to determine if, overall, electronic commerce was unduly burdened. Additionally, the court found it unnecessary to address an additional claim that the Illinois statute violated the Commerce Clause because the federal law was dispositive. *Id.* at 59-60.

None of these cases interpreting a federal non-discrimination statute resorted to the very difficult

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[18] For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

task of analyzing the entire tax system of the state to determine if an industry protected by a federal non-discrimination law was disfavored. That is impractical. Guided by these cases, this Court should limit its review solely to Alabama's sales and use tax imposition on the rail carriers as compared to its competitors, the motor carriers and interstate water carriers.

CONCLUSION

The State of Alabama and its *amici* are essentially requesting this Court to ignore the intent of Congress in its enactment of the 4-R Act. Congress, and not this Court, is the branch of government the State and its *amici* must approach to make changes to the protections afforded by the 4-R Act to rail carriers. Accordingly, *amicus* respectfully requests this Court to affirm the Eleventh Circuit's decision below and hold that Alabama's sales and use tax discriminates against the rail carriers in violation of the 4-R Act.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-553

In the

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE AND JULIE MAGEE, COMMISSIONER, DEPARTMENT OF REVENUE, IN HER OFFICIAL CAPACITY,
Petitioners,
v.
CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONERS

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioners Alabama Department of Revenue and Julie Magee, Commissioner of the Alabama Department of Revenue. The Commission urges this Court to reverse the decision of the Eleventh Circuit Court of Appeals, which held that Alabama's imposition of a broadly applicable sales and use tax on diesel fuels was unlawful as "another tax that discriminates" against rail carriers under 49 U.S.C. § 11501(b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 869-70 (11th Cir. 2013). The Eleventh Circuit concluded that Alabama's tax on diesel fuel purchased for use off-road, although imposed equally on railroads and most other industrial and commercial taxpayers, violated the Act because the identical tax was not borne by so-called

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Alabama. This brief is filed with the consent of the parties.

"competitors" engaged in other types of transportation services, most notably motor carriers who were subject to a different (but substantially equal) highway use tax on their fuel purchases. *Id.* at 871.

Prior to the passage of the 4-R Act in 1976, Congress spent many years studying the problem of discriminatory state and local property tax practices and crafted a measured legislative response that tied property tax rates and assessment ratios to those imposed generally on other industrial and commercial properties. 49 U.S.C. § 11501(b)(1)-(3). Just prior to passage of the Act, Congress added a fourth clause, Subsection (b)(4), to the three property tax anti-discrimination provisions. Subection (b)(4) prohibited "another tax that discriminates." S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 165-166 (1976). The proper scope and application of that fourth clause has been debated in the courts ever since, without a satisfactory resolution.

When this case first came before the Court, in *CSX Transp., Inc. v. Alabama Dep't of Revenue,* 131 S.Ct. 1101 (2011) ("*CSX I*"), the Court held that application of § 11501(b)(4) was not limited to property taxes, and further held that Congress's determination to exclude the effects of state property tax exemptions in defining "discriminatory" property tax practices in § 11501(b)(1)-(3) had no bearing on whether exemptions in other tax systems could constitute a form of discrimination under Subsection (b)(4).

Congress provided no guidance as to how "discrimination" with respect to taxes other than property taxes should be defined or evaluated within the confines of Subsection (b)(4) itself. Some courts have concluded that Subsection (b)(4) should be construed as a mandate to ensure that the railroads pay taxes in a manner identical to "competing" transportation modes. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 869-70 (11th Cir. 2013); *Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999); *Union Pac. R. Co. v. Minn. Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007); *Burlington N. R. Co. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993).

Other courts have concluded that Subsection (b)(4)'s prohibition of "another tax that discriminates" must be read in conjunction with Subsections (b)(1)-(3), which define discrimination by reference to how the railroads are taxed in comparison with in-state taxpayers generally. *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011); *Kan. City S. Ry. Co. v. McNamara*, 871 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996).

This case presents an opportunity for the Court to resolve the controversy in a manner which will reduce the extent of future litigation under the Act, by holding that a tax does not "discriminate" against railroads under Subsection (b)(4) if the tax is generally imposed on the state's taxpayers, even though the state may grant exemptions to that tax for reasons that have nothing to do with disfavoring

railroads. This is the approach Congress chose for ensuring that railroads are protected from discriminatory *property tax* assessments, and it should be assumed that Congress intended to apply similar principles when evaluating "discrimination" for other types of taxes. Not only is this approach to evaluating "discrimination" under Subsection (b)(4) consistent with Congressional intent as evidenced in the remainder of the Act, it is the only interpretation that will give state legislatures the certainty they need in enacting tax legislation.

The Eleventh Circuit's alternative to the broad comparison class approach specified in Subsections (b)(1)-(3) would not only grant railroads a "most favored taxpayer" status that no one believes Congress intended, but also would continue to involve federal courts in piecemeal challenges to state tax laws based on a changing subset of "railroad competitors," or potentially other subsets of taxpayers, not set out in the Act itself. The lower court's reasoning could be extended to all sales tax exemptions as well as other taxes, filing methods, credits, incentives, etc., that distinguish between different industries or taxpayers, whether as a result of necessity, administrative convenience, general tax policy or history. Such interference in state tax policy is unnecessary in order to achieve Congress's goal of protecting railroads from unfair tax burdens. That goal can be achieved while still preserving state sovereignty if the Court holds that a tax does not "discriminate" against railroads so long as the state's taxpayers generally bear the burden of that tax as well.

The Commission was established by the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Commission,* 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as Compact, Sovereignty or Associate member states. The states are represented in the Commission by the heads of the state agencies charged with administering state taxes.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Multistate Tax Compact (the "Compact"), Art. I. The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d. Sess. (1966)(illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax).

The Commission's interest in this case arises from our goal of preserving the states' sovereign authority to set tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond that which is permitted under the U.S. Constitution and the clear mandate of Congress. The Commission also has a vital interest in seeing that Subsection 11501(b)(4) is interpreted and applied so that it does not create insurmountable administrative burdens. Interpreting Subsection 11501(b)(4) as giving railroads "most favored taxpayer" status would exacerbate the difficulties faced by state lawmakers and tax administrators alike in predicting what taxes might be negated by federal preemption.

SUMMARY OF ARGUMENT

Your *amicus* asserts that Congress did not intend to give the federal courts *carte blanche* authority to define "discrimination" in a manner that allows railroads to avoid generally-imposed and non-targeted tax impositions, as the Eleventh Circuit has done in this case. The structure and stated purpose of the Act, as well as its comprehensive legislative history, demonstrates that a broad-based tax generally imposed on purchases made by all businesses and citizens does not "discriminate" against railroads merely because certain so-called competitors either pay a different tax on their purchases, or are entitled to an exemption that has not been shown to disfavor the railroads.

As this Court previously recognized in *Dep't of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994), the meaning of Subsection 11501(b)(4)'s prohibition against "another tax that discriminates" cannot simply be formulated on an *ad hoc* basis or as a theoretical abstraction, detached from important principles of federalism, and specifically, the fundamental connection between a state's sovereignty and its taxing power. Congress knew that it was not writing on a blank slate when it enacted this provision, but was addressing itself to fully-developed state tax systems, created by sovereign governments to meet the needs of their citizens. Adherence to the principles of federalism, and recognition that state tax systems were well developed by 1976, compels the conclusion that Subsection (b)(4)'s prohibition of "discriminatory" taxes must be applied narrowly to avoid unnecessary intrusion into matters of state policy.

The judicial creation of a class of "railroad competitors" without any textual reference whatsoever is one indication that the lower courts have failed to heed the lessons of *ACF Industries*. The Eleventh Circuit's similarly-arbitrary determination that any difference in the imposition on railroads of a broad-based generally applicable tax is *per se* "discriminatory" and cannot be justified even by a clearly compensatory tax paid by those "competitors," is a second indication that the 4-R Act's "discrimination" jurisprudence has been loosed from its moorings.

Further, the Respondent, CSX Transportation, Inc., failed to show that Alabama's tax structure had the actual discriminatory effect on railroads that Congress intended to prohibit under Subsection 11501(b)(4). The lower court erred not only in overlooking this failure, but also in equating mere differences in tax impositions with impermissible "discrimination" against railroads.

ARGUMENT

In 49 U.S.C. § 11501(b)(1)-(3), Congress instructed the federal courts to resolve the question of "discrimination" for property tax purposes by asking whether the rates and valuation methods imposed on railroad property were roughly equal to the rates and methods imposed on the property of commercial and industrial taxpayers in the taxing jurisdiction. This approach to determining "discriminatory" taxes was not designed to offer protection to railroads vis-à-vis potential competitors in the transportation industry. Rather, this approach offered protection for the railroads, a "nonvoting, often nonresident" industry, *ACF Industries*, 510 U.S. at 336, by linking the taxation of railroads to the taxation of businesses with local political influence. *CSX I*, 131 S. Ct. at 1117 (Thomas, J. *dissenting*). Moreover, this protection was achieved with the least amount of intrusion into state tax policy matters, preserving the ability of states to grant exemptions for policy purposes by excluding exempted property from the comparison class. *ACF Industries*, at 343-344.

A. *ACF Industries* Applied the Correct Analysis of § 11501 (b)(4) in the Context of Property Taxes; That Analysis is Equally Applicable Here.

In *ACF Industries*, this Court held that because the scope of Subsection (b)(4)'s prohibition of "discriminatory" taxes was uncertain, it must be read in context with the remainder of the statute. *Id.* at 339-340. When addressing state property taxes, Congress tied the treatment of railroad property to the rates and valuation ratios generally accorded the property of commercial and industrial taxpayers. Congress was aware that many states had policies favoring particular businesses or types of property, such as pollution control equipment, business inventories, raw materials used in textile manufacturing, manufacturing machinery and allied equipment, and mechanics tools, by granting specific exemptions. *Id.* at 343-344. Congress's decision not to disrupt these existing exemptions in the context of the detailed statutory framework for measuring discriminatory effect in Subsections (b)(1)-(3) precluded a finding that Subsection (b)(4) was intended to provide equivalent application of exemptions to railroads.

The same principles that kept this Court from applying Subsection (b)(4) to grant railroads "most favored taxpayer" status—by forcing states to give railroads the benefit of every property tax exemption—are applicable here. There is no principled reason to construe Subsection (b)(4) as having a more expansive application to state sales

and use taxes than to property taxes. As Justice Thomas wrote when this case was last before the Court:

> Subsection (b)(4) should be understood to tackle the issue of systematic railroad over-taxation the same way that the other subsections do—by linking the taxation of railroads to the taxation of businesses with local political influence. Thus, a "tax that discriminates against a rail carrier" is a tax that targets or singles out rail carriers compared to commercial and industrial taxpayers.

CSX I, at 1117 (Thomas, *J. dissenting*).

1. Alabama's System of Exempting Fuels Subject to the Fuel Tax from the Sales Tax Was Common in 1976, so it is Unreasonable to Expect Congress Simply Failed to Address That System Explicitly if its Intent was to Preempt That System.

Alabama imposes a generally applicable sales and use tax of 4% on most purchases or uses of tangible property, including diesel fuel, [2] with a corresponding exemption for diesel fuel purchased for highway use, as those purchases are subject to two separate state taxes totaling 19 cents per gallon.[3] It is a taxing structure that was common

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[2] *See* ALA. CODE §§ 40-23-2(1), 40-23-61(a)

[3] *See* ALA. CODE §§ 40-17-325(a)(exemption); 40-17-2(1); 40-17-220(e).

among the states in 1976 and remains so today. John F. Due & John L. Mikesell, *Sales Taxation: State And Local Structure And Administration* 77 (Urban Inst. Press 2d ed. 1994) (1983).

State taxes on highway fuels are measured by gallons purchased, in contrast to state sales and use taxes on purchases generally, which are imposed on the price paid. The "per gallon" taxing system for highway fuels is necessitated by federal highway tax revenue-sharing programs; the distinction between "dyed" off-highway fuel and undyed fuel used on roadways is a requirement of federal law. 40 C.F.R. §§ 80.520-27. State fuel taxes preceded the adoption of generally-applicable sales and use taxes[4] and, even after the adoption of general sales taxes, continued to provide a primary revenue source for states until surpassed by sales taxes in the middle of the Twentieth Century. Congress was also aware in 1976 that most states then, as now, exempted fuels purchased for highway use from sales and use taxes to avoid duplicative taxation. Due, *supra*. Had Congress intended to upset this long-standing and critically important component of state taxing systems out of some concern that railroads and their "competitors" paid different types of taxes on fuel, it would surely have spoken with "clarity and precision," *ACF* at 344, on the subject.

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[4] All fifty states had a tax on fuel by 1932. Pamela J. Jackson, *The Federal Excise Tax on Gasoline and the Highway Trust Fund: A Short History* CRS-1 (2006). Mississippi enacted the first sales tax in 1932. John Due, *The Nature and Structure of Sales Taxation,* 9 Vand. L. Rev. 123, 127 (1956).

Any concern Congress might have had with unequal state and local tax burdens on competing "transportation providers" presumably would also have been addressed in the property tax context, the only tax specifically addressed in the 4-R Act. But Congress made no effort to prohibit potentially unequal property tax burdens on competitors, electing instead to tie the railroad's treatment to commercial and industrial taxpayers generally.[5]

2. There is No Evidence in the Legislative History of the 4-R Act that Congress Intended Subsection (b)(4) to Require States to Impose the Same Tax on Fuel Purchased by Railroads and Their Competitors.

If Congress intended to impose a mandate on the states to provide identical tax treatment of on-road and off-road fuel, one would expect to find some evidence of this in the "15-year legislative history of the 4-R Act," *ACF* at 346, yet the extensive record is completely silent on the topic. The record regarding the adoption of what became § 11501(b) is addressed almost entirely to state property taxation. Regarding competitive modes of transportation, it can only be said that Congress was aware that railroads bore a proportionally higher state and local property tax burden because of the capital-intensive

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[5] *See also* 49 U.S.C. § 11501(a)(exempting "other transportation property" from the scope of commercial and industrial property subject to comparison with railroad property tax burdens).

nature of their operations, justifying Congress in taking action first in that area. *See* National Transportation Policy, S. Rep. No 87-445, 87th Cong, 1st Sess III–IV (1961) at 449. There is no mention of any differences in how states imposed sales, income, franchise, gross receipts or other general taxes on different industries, let alone how those taxes might be imposed on different business inputs for those industries.

3. Congress Would Have Clearly Expressed its Intent to Preempt the State's Long-Established Systems for Taxing Fuel, and Would Have Provided Guidance for the Courts.

ACF recognized an overarching principle that any statute having preemptive effect on state taxing authority must be interpreted in the context of our federalist system of government. Congress has historically shown restraint in exercising its power to preempt state taxing authority, cognizant that such authority is one of the states' traditional powers and a foundational component of our constitutional system. *See, e.g.*, the Federal Tax Injunction Act, 28 U.S.C. § 1341. Where Congress has acted to preempt state tax laws, it has generally done so in a narrowly-focused and highly specific manner. *See, e.g.*, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. §§ 501-593 (setting forth procedures and limitations on taxing non-resident military personnel and spouses on active duty within state.)

In drafting the anti-discrimination provisions of § 11501, Congress was aware that it must speak clearly if it wished to preempt state law, especially when intruding on areas of traditional state concern. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). It should therefore be presumed that Congress would write its statutes accordingly. "[I]f Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress should make its intentions 'clear and manifest if it intends to preempt the historic powers of the States."); see also *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *De Buono v. NYSA-ILA Medical and Clinical Fund*, 520 U.S. 806, 814-815 (1997).

The meaning of Subsection (b)(4) in the property tax context "is, at best, vague," *ACF* at 433; its potential application to other taxes is even more so. In *ACF*, this Court held that "principles of federalism support, in fact compel" a narrow reading of the application of Subsection (b)(4):

> Principles of federalism support, in fact compel, our view. Subsection (b)(4), like the whole of § 11503, sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976); *Railroad Co. v. Peniston*, 85 U.S. 5, 29 (1873). When determining the breadth of a federal statute

> that impinges upon or pre-empts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope. See *Cipollone*, 505 U.S. at 533 ("We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language") (Blackmun, J., concurring); *id.*, at 523 (opinion of Stevens, J.); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). We will interpret a statute to pre-empt the traditional state powers only if that result is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. As explained above, neither subsection (b)(4) nor the whole of § 11503 meets this standard with regard to the prohibition of property tax exemptions.
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> *Id.* at 345.

Subsections (b)(1)-(b)(3) of § 11501 follow the established pattern of limited federal interference with state taxing authority by providing narrow and specific definitions of discriminatory tax practices. This Court concluded that in the context of those specific guidelines, it would be illogical to read Subsection (b)(4) as giving federal courts a separate and unlimited power to decide what constitutes discriminatory property tax practices. *ACF*, at 340. It would be just as illogical to conclude that in enacting Subsection (b)(4) Congress abandoned its policy of restraint by empowering federal courts to strike down *all other* state taxes that might apply to

a group of taxpayers differently than to railroads, without providing any guidance or limitations whatsoever.

B. Setting up a Comparison Class Comprised of the Railroads' Potential Competitors Intrudes on State Sovereignty in a Manner Congress Could Not Have Intended and that is Unworkable in Practice.

The structure and legislative history of the 4-R Act, as well as principles of federalism support the conclusion that the "comparison class" should be drawn broadly, to include industrial and commercial taxpayers generally. Determining whether a tax paid by railroads is also borne generally by the class of industrial and commercial taxpayers is a simple and straightforward exercise for courts and legislatures. By contrast, virtually every aspect of the "competitors" comparison class model adopted by the Eleventh Circuit would properly require extensive fact-finding and weighing of policy considerations more appropriate to legislatures than courts.

There is no single test for "discrimination" applicable in all tax contexts. *CSX I*, at 1115 (Thomas, J., *dissenting*.) Potential considerations include: (a) who bears the legal or economic incidence of a tax, either directly or indirectly; (b) which aspects of the overall tax structure should be evaluated, including complimentary, compensatory or even unrelated taxes; (c) what is the appropriate comparison class; (d) what constitutes an acceptable

justification for differential treatment;[6] (e) the legal standard for evaluating dissimilar treatment, such as rational basis or compelling necessity;[7] and (f) whether the taxpayer must demonstrate discrimination in practical effect. [8] Where impermissible discrimination is ultimately found, a court may still have to grapple with whether the state has offered a sufficient remedy.

The protracted litigation in this case has so far focused on only two of those possible considerations: (a) whether the "comparison class" should be "railroad competitors" or the broader class of state taxpayers generally; and (b) if railroad "competitors" are the appropriate comparison class, whether compensatory taxes paid by those competitors should be considered in determining whether a tax scheme "discriminates."

1. Railroads and their "Competitors" Are Not Similarly-Situated Taxpayers.

Perhaps the most critical inquiry in any "discrimination" case is determining whether there is a comparison class of similarly-situated parties.

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[6] *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008)

[7] *Compare, Amerada Hess Corp.* v. *Dir., Div. of Taxation, N. J. Dep't of Treasury*, 490 U.S. 66, 80 (1989)(applying rational basis standard in equal protection clause case); and *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (applying compelling interest standard in dormant commerce clause case).

[8] *Am. Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 432 (2005) (taxpayer failed to demonstrate discriminatory effect of unapportioned truck registration fees.)

This Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) is particularly instructive on the question of what constitutes "similarly-situated taxpayers" for purposes of discrimination claims under the dormant Commerce Clause. In that case, out-of-state natural gas wholesalers subject to excise tax on their sales into Ohio challenged the law because "local distribution companies" ("LDC's") doing business in Ohio were exempt from that tax. The LDC's tended to sell natural gas in the regulated market for residences and smaller businesses, although they competed with the wholesalers in some instances. This Court put great emphasis on the long history of federal, state and local regulation of natural gas utilities (and the relative absence of regulation over wholesale sellers) in deciding that Ohio's taxing system did not impermissibly "discriminate" against interstate commerce, writing:

> The fact that the local utilities continue to provide a product consisting of gas bundled with the services and protections summarized above, a product thus different from the marketer's unbundled gas, raises a hurdle for GMC's claim...
>
> Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities... [W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional

> purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.
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> 519 U.S. at 297-298.

Railroads, trucking companies, airlines, barge companies and pipeline companies are not similarly-situated taxpayers, any more than are natural gas wholesalers and distributors. They perform different—and sometimes complementary—transportation functions, operate under different regulatory structures, receive different forms of government assistance and subsidies, and impose different societal costs and benefits. Those differences in regulatory history, structure, operation and function have inevitably been reflected in differences in how taxes are imposed. One obvious difference is that, historically and as a federal regulatory matter, fuels intended for highway use are taxed by the states on a per-gallon basis, while state sales and use taxes are imposed on a value basis.

Congress was presumably aware of these differences in taxing systems in 1976 and made no attempt to address them in the 4-R Act. It would not have been an easy task for Congress to do so, as it would have required the balancing of many economic, policy and administrative concerns.[9] Nor did Congress empower a regulatory agency to resolve the many technical and policy issues necessary to implement rules for equalizing tax burdens among the transportation segments.[10]

2. Adoption of the "Railroad Competitors" Comparison Class Approach Would Not Resolve Litigation Over the Meaning of § 11501(b)(4); It Would Increase it.

If the Eleventh Circuit's "competitor" comparison class were accepted by this Court, both legislatures and courts would be forced to speculate as to whether a particular tax imposition affecting dissimilar transportation industries in dissimilar ways constitutes impermissible discrimination. For instance, if the legislatures of neighboring states wished to compete for a new port facility by exempting certain shore-side activities from tax, must they be concerned that analogous activities

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[9] For instance, railroads consume significantly less fuel in moving freight, *see* About CSX: Fuel Efficiency, *available at* http://www.csx.com/index.cfm/about-csx/projects-and-partnerships/fuel-efficiency/ (last visited Sept. 14, 2014), suggesting that truckers would bear a significantly higher tax burden measured on a per-ton-mile basis if the different taxes on a given volume of fuel were roughly equal.

[10] *Compare*, 1972 Education Act (Title IX) and Regulations of the Offices of the Department of Education, 34 CFR Subtitle B.

conducted at railroad facilities continued to be taxed? Should it matter that the port facility will not serve the same export markets as the railroads, or that the new port facility will be exclusively served by the railroads themselves, thus increasing their traffic volume in the state?

It would surely increase the number of such questions and the litigation burden on the states and the courts if the "competitor" comparison class is adopted. For instance, there is no simple and obvious means for defining the "competitive marketplace" on a local, statewide or national basis. A use tax exemption for compressor gas [11] used to move commodities in a pipeline may or may not be "discriminatory" depending on how a court might define "competition" and whether railroads compete in transporting that same commodity to the same locations.

Regarding the different taxes on fuels at issue in this appeal, it should be noted that virtually all major railroads, including CSX, have now established intermodal transportation businesses combining train and truck shipments.[12] According to

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[11] *Mississippi River Transmission Corp. v. Weiss*, 65 S.W.3d 867 (Ark. 2002).

[12] As CSX's intermodal transportation service website explains, "[i]t's not trains replacing trucks. It's trains and trucks, and often cargo ships, working together to deliver goods on time with improved efficiency. *Trip of a Lifetime: Intermodal 101*, *available at* http://www.intermodal.com/share/wwwintermodal/assets/File/Resource%20Center/Information%20Kits/Intermodal_101_One-sheeter.pdf. (last visited sept. 10, 2014)

CSX's 2012 Annual Report, 38% of its traffic volume consisted of intermodal shipping, "combin[ing] the superior economics of train transportation with the short-haul flexibility of trucks...." [13] In the same *Annual Report*, CSX lists among its business concerns: "...the challenges associated with labor, *fuel* and other costs at *trucking companies*, which today are partnering with us for longer-haul movements." [14] State tax policies affecting trucking operations affect railroads, and vice-versa. Whether the two industries compete with or complement each other may vary from region to region and from commodity to commodity, and may vary over time. Each of those variables and others would complicate the task confronting courts and legislatures in conforming existing state law to the preemptive mandates of § 11501(b)(4) under the competitive class approach.

Frequently, this Court has explained its refusal to act in a legislative capacity in discrimination cases by noting that Congress has the ability to study the issue and adopt legislation where appropriate under its affirmative Commerce Clause authority. *General Motors v. Tracy*, at 304; *Moorman v. Bair*, 437 U.S. 267, 279-280 (1978).These same considerations should guide the Court in interpreting Subsection (b)(4). Nothing in the 4-R Act indicates Congress was concerned with relative

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[13] CSX Annual Materials, 2007-2014, *available at* http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-reportsannual. (last visited Sept. 12, 2014).

[14] *Id,* at 6 (emphasis supplied.)

tax burdens on different transportation modes, but Congress remains in a far better position to study the facts and make the policy choices which would be necessary to adjust those burdens should it see the need to do so.

3. The Same Methodology Used to Evaluate Property Taxes Should Apply to Other Taxes.

The Fifth, Seventh and Ninth Circuits have held that the proper test for any claim of tax discrimination should be whether the tax is generally imposed on commercial and industrial taxpayers.[15] These courts have recognized that the use of the broader class is appropriate because it is the class chosen by Congress for measuring whether state property taxes "discriminate" against railroads.

Comparing the treatment of railroads to taxpayers generally not only implements Congressional intent to place railroads on an equal basis with other taxpayers, but it also allows for a meaningful application of the 4-R Act where it is alleged that a state tax disparately burdens *all* transportation companies, *Kan. City S. Ry. Co. v. McNamara*, 871 F.2d 368 (5th Cir. 1987), or where there are no "competitors" in the taxing jurisdiction.

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[15] *Kan. City S. Ry. Co. v. McNamara* 871 F.2d 368 (5th Cir. 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438 (9th Cir. 1996); *Burlington B. R.R. v. City of Superior*, 932 F.2d 1185, 1187 (7th Cir. 1991); *Kan. City S. Ry. Co. v. Koeller*, 653 F.3d 496 (7th Cir. 2011).

Kan. City S. Ry. Co. v. Koeller, 653 F.3d 496 (7th Cir. 2011).

Just as significantly, the approach adopted by Congress for measuring property tax discrimination will eliminate the necessity to determine many of the "knotty questions," *CSX I* at 1114, inherent in the competitive class approach.

The sole question presented for determination is whether the tax imposition on the railroads is also generally imposed on the bulk of commercial and industrial taxpayers in the state. If so, it should be presumed, absent evidence to the contrary,[16] that the political power of those citizens has protected the railroads from undue economic burdens. This inquiry is far more straightforward and does not involve the federal courts in complex economic analysis or second-guessing the policy decisions of state lawmakers.

C. CSX Has Not Shown it Has Suffered Any Discriminatory Effects from the Different Taxes Imposed by Alabama on Diesel Fuel

When the case was last before the Court, it held that the State should be given an opportunity to justify any differences in taxation between the railroads and the comparison class when a challenge

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[16] As the Court noted in *ACF Industries, supra* at 346-7, Congress surely would have been concerned with *any* taxing scheme which imposed a generally applicable tax but then exempted everyone except the railroads from its reach. That scenario is not presented by the facts of this case.

is brought under Subsection (b)(4). 131 S.Ct. at 1108. The Court did not elaborate on what standard should be used to measure that justification, and of course the statute is completely silent on the point.

The Commission agrees with Petitioners that the most appropriate standard would be what is applicable to claims of impermissible "discrimination" under the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). *See* Brief for Petitioners at 45-50.

Alabama has a very rational reason to provide a sales and use tax exemption for fuel subject to its road taxes: to prevent double taxation. Alabama has also amply shown it has rational reasons for allowing an exemption for fuel purchased for use in interstate water transportation: such activity has long been thought to be outside of the state's reach under the dormant Commerce Clause. Additionally, taxing such activity presents unique administrative challenges in tracking where fuel is consumed. *Id.* at 58-59.

But CSX's claims fail as well in the context of the tests used to measure impermissible discrimination under dormant Commerce Clause analysis, U.S. CONST., art. III, § 8, cl. 3. Alabama's policy of subjecting on-road diesel to a fuel tax and off-road diesel, including diesel purchased by railroads, to a sales tax, is not facially

discriminatory in that it does not clearly single out railroads for unfavorable treatment. Under this Court's commerce clause "discrimination" jurisprudence, in the absence of a facially discriminatory statute, it is necessary for the complaining party to show that the statute has an actual discriminatory effect on interstate commerce, or in this case, on the commerce carried out by the railroad. *General Motors v. Tracy*, at 311. This CSX has not done.

The case of *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) is directly on point. The taxpayer in that case complained that Michigan's flat fee on intrastate commercial truck operating permits constituted an "un-apportioned tax" that violated the dormant Commerce Clause under the Court's prior decision in *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284 (1987). This Court sustained Michigan's tax because the record failed to reflect how much of an effect the flat tax had in discouraging interstate commerce:

> [T]the record contains little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade. [citation omitted] The record does show, for example, that some interstate trucks "top off" some interstate hauls with intrastate pickups and deliveries. [citations omitted] But it does not tell us the answers to such questions as: How often does "topping off" occur across the industry? Does the $100 charge make a difference by

> significantly discouraging interstate carriers from engaging in "topping off"?
>
> If the fees ($100 and $10) discourage "topping off," does that *local* commercial effect make a significant *interstate* difference? Would a variable fee (of the kind the truckers advocate) eliminate such difference? The minimal facts in the record tell us little about these matters.
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> 545 U.S. at 438.

As this Court has repeatedly held, "We have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *General Motors v. Tracy* at 311, *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 654 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

This Court's jurisprudence judging impermissible "discrimination" under the dormant Commerce Clause could also be used as a basis for evaluating the claim of discrimination in the context of "competitor" comparison class asserted by the Respondent. The Respondent's claim of discrimination, however, is problematic in another way. Ironically, for a case based on alleged disparate treatment afforded to so-called competing modes of transportation in Alabama, there is almost nothing in the record demonstrating the degree to which these transportation modes are actually in competition. Trucks, barges and railroads each have

unique attributes in the transportation industry, and unique drawbacks. It is entirely speculative on this record to conclude that changes in fuel tax structure or rates would affect the percentages of freight moved by these different transportation modes.

Nothing in the record can be used to show that barges actually compete for the railroads' business in moving freight through Alabama. It may be that Alabama's decision to exempt interstate (but not intrastate) barge traffic from fuel taxes *principally* benefits Alabama railroads, which may supply those barges with commodities that would otherwise by transported by other means. In any case, barge traffic accounts for only 1% of the commodity traffic in the state. *See* J.A. 29-30, cited in Brief of Petitioners at 59, raising the question of whether the alleged "competition" from this transportation mode could ever rise above a *de minimis* threshold.

Finally, evidence of discrimination in actual effect would be particularly difficult to come by in this case, since CSX is not required to pay the very tax it claims is discriminatory. While trucking companies must pay state and federal highway taxes on purchases of the "undyed" diesel fuel used on the state's highways, the railroads are not required to pay sales and use taxes on their diesel purchases. Brief of Petitioners at 57. The railroads can instead elect to pay highway tax on undyed fuel instead, allowing them to take the benefit of the exemption

from sales tax, and giving them the choice of paying whichever tax is lower at a given time.[17]

CONCLUSION

This case presents an opportunity for the Court to resolve the split among the circuits as to how discrimination should be measured in the context of taxes, other than property taxes, for purposes of the 4-R Act. The Court should apply the standard Congress applied for ensuring that railroads are protected from discriminatory property tax assessments: that a tax does not "discriminate" against railroads under Subsection (b)(4) if the tax is generally imposed on the state's taxpayers, even though the state may grant exemptions to that tax for reasons unrelated to disfavoring railroads. Not only is this approach to evaluating "discrimination" under Subsection (b)(4) consistent with Congressional intent as established above, it is the only interpretation that will give state lawmakers the certainty they need when enacting tax legislation.

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[17] *See* Internal Revenue Service Publication 510, Excise Taxes (Including Fuel Tax Credits and Refunds), and IRS Form 8849, Claim for Refund of Excise Taxes (procedures for claiming for refund of federal highway excise taxes when undyed fuel is used for off-road purposes).

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September 16, 2014

AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF STATE & LOCAL GOVERNMENT ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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SUMMARY OF THE ARGUMENT 4

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's fifty States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing State issues. NCSL advocates for the interests of State governments before Congress and federal agencies, and regularly submits *amicus* briefs to this

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[1] Pursuant to Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of *amicus* briefs are on file with the Court.

Court in cases, like this one, that raise issues of vital State concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

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The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to pro-

vide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

SUMMARY OF THE ARGUMENT

Subsection (b)(4) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R") prohibits a state from imposing "[a] tax that discriminates against a rail carrier." 49 U.S.C.A. § 11501(b)(4). Congress passed 4-R to "restore the financial stability of the railway system of the United States" by rooting out State and local taxation schemes that discriminated against rail carriers. 90 Stat. 33; *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S.Ct. 1101, 1105 (2011); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

Rail carriers have long benefited from special treatment by governments. The federal government granted railroad developers "thousands of miles of rights-of-way across . . . public lands" in the nineteenth century, and up through the twentieth century, it transferred "millions of acres of public land" to them. Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the*

Myth of Congress's '1871 Shift,' 82 U. COLO. L. REV. 85, 85 (2011). Alabama, the petitioner here, was no exception to this trend. *See, e.g., Montgomery v. Alabama Power Co.*, 34 So.2d 573, 575 (Ala. 1948) ("[W]e also have a well-established rule that, while a railroad company has no right to enter upon and take the lands of another without his consent or without condemnation proceedings . . . if it does enter and construct its track upon the land of another, and the owner has knowledge . . . and he allows it to spend large sums of money on improvements . . . he will be estopped from ousting the company").

Today, Alabama levies a 4 percent sales tax on rail carriers for diesel fuel they purchase. Ala. Code Ann. §§ 40-23-2(1), 40-23-61(a). This tax is paid by Alabama's commercial and industrial taxpayers in general, and its proceeds go into the State's general revenue fund. Ala. Code Ann. §§ 40-23-35, 40-23-85. Additionally, the State also assesses a tax on motor carriers. Here, motor carriers pay a nineteen-cent-per-gallon excise tax in lieu of a sales tax on diesel fuel, the proceeds of which support road maintenance. Ala. Code Ann. § 40-17-325(a). Interstate water carriers are exempted from Alabama's diesel fuel sales tax and have been for over half a century, possibly because of constitutional

concerns about taxing vessels in navigable waters at the time. Ala. Code Ann. §§ 40-23-4(a)(10), 40-23-62(12); Pet. for a Writ of Cert. at 5. CSX Transportation, Inc. ("CSX"), a large nationwide rail carrier, argues that this tax scheme is pre-empted by 4-R because it is discriminatory.

This Court should reject CSX's claim and reverse the Eleventh Circuit's ruling striking down Alabama's tax scheme. States have traditional power over taxation that this Court's federalism jurisprudence respects. This power is an important part of the power of the States, as coequal sovereigns, to experiment with solutions to policy problems. Additionally, this Court must not find preemption where State and federal policies—like Alabama's tax scheme and 4-R here—do not conflict with each other.

Alabama's tax scheme does not discriminate against rail carriers simply because it subjects them to a general sales tax while tailoring the tax scheme's application to other taxpayers. This Court must interpret 4-R as a narrow statute, not a sweeping mandate for courts to redesign State tax schemes. There are three ways to do this: (1) comparing the tax treatment of rail carriers to the general base of commercial and industrial taxpayers in the State; (2)

requiring calculation of the actual amounts rail carriers and other taxpayers pay; or (3) noting relevant differences between rail carriers and other taxpayers.

Ruling in favor of CSX would threaten States' ability to take in tax revenue, an ability already impeded by current economic conditions. This Court must not allow 4-R to shield CSX—a $12 billion nationwide corporation—and other rail carriers from paying millions of dollars in taxes that fund vital public services. Congress did not intend for 4-R to enrich large corporations by impoverishing the States.

ARGUMENT

I. THIS COURT SHOULD NARROWLY CONSTRUE 4-R BECAUSE STATES HAVE TRADITIONAL POWER OVER TAXATION.

This case operates against a backdrop of federalism, which contemplates a balance between national, State, and local governments. While it is true that this Court rejected federalism arguments

in *CSX I*, 4-R is not nearly as clear as applied here.[2] *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1112 (2011). This Court should reject CSX's interpretation because of federalism. First, this case implicates this Court's respect for the traditional State power to tax. Second, the Court's ultimate interpretation of 4-R implicates preemption rules, under which there is no preemption unless Congress has clearly stated there to be or a State law so disrupts the federal purpose behind federal law that it cannot stand. Both principles require this Court to interpret 4-R's antidiscrimination provision as narrowly as possible in order to respect these principles.

The Constitution does not grant the federal government exclusive taxing power.[3] Rather, "the

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[2] *See Dep't of Revenue of Oregon v. ACF Indus.*, 510 U.S. 332, 345, 353 (1994) (placing great emphasis on federalism principles by construing 4-R to avoid making States choose between exempting railroads and removing all of their tax exemptions).

[3] *See* U.S. CONST. art. I, § 10 (listing powers prohibited of States, not including taxation); THE FEDERALIST NO. 32 (Alexander Hamilton) (emphasizing the importance of having the concurrent jurisdiction to tax).

right of taxation is concurrent, and may be exercised by both [the federal and State governments] upon the same person and property." *Thurlow v. Massachusetts*, 46 U.S. 504, 531—32 (1847). The fact that the Framers intended for taxation to be concurrent among the federal government and the States—as opposed to simply vesting the power with the federal government alone—demonstrates that Congress and this Court should not lightly intrude upon it.

This Court has long presumed that States, as sovereign entities, have the power to tax, a power at the heart of federalism. States must have wide authority to tailor their tax schemes to meet their expenditures. Given the complexities inherent in taxation, States must be afforded latitude "to serve as 'laboratories' to experiment with procedures" and craft policies. *Crist v. Bretz*, 437 U.S. 28, 40 (1978). "Denial of the right to experiment," in taxation more than in most areas, "*may be fraught with serious consequences.*" *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 216 (1994) (emphasis added). "It is one of the happy incidents of the federal system that a . . . State may . . . serve as a laboratory, and try novel . . . economic experiments without risk." *Id.*; *cf. Smith v. Robbins*, 528 U.S. 259, 273 (2000) (expressing an unwillingness to contravene the established practice,

"rooted in federalism, of allowing States wide discretion . . . to experiment with solutions to difficult problems of policy").

This Court most clearly showed its concern for traditional State taxation power in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977). That case created a bright line rule recognizing State power to tax, limited only by very few exceptions: the taxed activity must have a substantial nexus to the taxing State, the tax must be fairly related to the benefits provided the taxpayer, it must not discriminate against interstate commerce, and it must be fairly apportioned.[4] Alabama's tax scheme is well within this power to tax.

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[4] *Id.* The *Complete Auto Transit, Inc.* test is basically a culmination of past Court exceptions centered around taxation on incidents sufficiently tied to interstate commerce, negatively impacting foreign corporations: (1) States may not tax the privilege of interstate commerce. (2) States may not tax local incidents involved in interstate commerce or property beyond the State's borders. *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925). (3) States may not tax in a manner that discriminates against or unduly burdens interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963).

Moreover, this Court—out of respect for the States' status as independent sovereigns within the federal system[5]—has adhered to the clear statement rule by refusing to allow federal statutes to supersede the traditional powers of States without a clear statement of Congressional intent. *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2188 (2014) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). This Court is reluctant to upset the constitutional balance of Federal and State powers without such a statement. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Put another way, there is a presumption against preemption that requires courts to read federal statutes' preemption clauses narrowly so as not to encroach on State power. *Altria Group, Inc. v. Good*, 555 U.S. 70, 70 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'") (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). This presumption doubtless applies when the State

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[5] *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, *each protected from incursion by the other.*") (emphasis added).

power in question is one as central to the functioning of State government as taxation. This Court should interpret 4-R narrowly to avoid encroaching on the traditional State power of taxation.

II. ALABAMA'S TAX SCHEME DOES NOT DISCRIMINATE AGAINST RAIL CARRIERS.

Success of a 4-R claim turns on the meaning of "discriminate." In an earlier appeal in this case, this Court concluded that discrimination is "the failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011). 4-R is not a broad preemption of State tax power, but a narrow statute targeting a narrow problem.

This Court can read 4-R narrowly to uphold its meaning alongside States' ability to fashion their taxation schemes in three ways. First, this Court could adopt the Seventh and Ninth Circuits' functional approach, comparing the tax treatment of rail carriers to the general base of commercial and industrial taxpayers in the State. Second, it could require calculation of the actual amounts paid under the excise tax to which motor carriers are subject and

the sales tax to which rail carriers are subject, which will show that no actual discrimination has occurred. Third, it could take into account the relevant differences between rail carriers, motor carriers, and water carriers, which, under the totality of the circumstances, justify Alabama's tax scheme.

A. This Court Should Adopt the Functional Approach to Tax Discrimination.

The Seventh and Ninth Circuits have adopted a "functional" approach that compares rail carriers to the general base of commercial and industrial taxpayers within the state. *Kansas City S. Ry. Co. v. Koeller*, 653 F.3d 496, 508 (7th Cir. 2011); *Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 441 (9th Cir. 1996). The functional approach accords with the fundamental principle that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)). Subsection (b)(4) of 4-R—at issue here—must be interpreted in light of subsections (b)(1) through (b)(3), each of which adopts the functional

approach. 49 U.S.C.A. § 11501. These subsections prevent discrimination against rail carriers compared to "other commercial and industrial property" in general. 49 U.S.C.A. § 11501(b)(1)—(b)(3). "Discrimination" for the purposes of subsection (b)(4) is limited to comparison with the general base of commercial and industrial taxpayers by the context and structure of 4-R.

The Eleventh Circuit held that limiting the comparison class to direct competitors would best accomplish Congress's purpose of ensuring "financial stability" for railroads under the 4-R Act. *CSX Transp., Inc. v. Alabama Dep't Revenue*, 720 F.3d 863, 869 (11th Cir. 2012). Additionally, the court stated that it would prove too burdensome to assess Alabama's tax scheme by comparing CSX to the general base of commercial and industrial State taxpayers. *Id.* It held that limiting the comparison class to direct competitors would best accomplish Congress's purpose of ensuring "financial stability" for railroads under 4-R. *Id.*; *contrast with Kansas City S. Ry. Co.*, 653 F.3d at 509 ("*[T]he only simple way* to prevent tax discrimination against the railroads is to tie their fate to the fate of a large and local group of taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against unfair distribution of the tax

burden.") (emphasis added) (internal quotation marks omitted).

This rejection of the functional approach does not further the statute's aims. 4-R was enacted to protect the financial stability of interstate railroads in the face of in-state protectionism. S. Rep. No. 90-1483 (1968) at 2. Interpreting 4-R to require comparison to interstate competitors, rather than in-state taxpayers, thwarts the statute's purposes. *Kansas City S. Ry. Co.*, 653 F.3d at 509 (noting that "Congress certainly did not intend" to give rail carriers preferential treatment compared to other interstate carriers). The functional approach, by contrast, ties the discrimination analysis to the statute's purpose by comparing railroads to the in-state businesses Congress feared States would favor.

The functional approach does not inappropriately burden the court. As described in Section B below, a calculation of comparative tax liabilities is manageable.[6] Moreover, 4-R's focus on local bias

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[6] In fact, the practical challenges of ascertaining any given taxpayer's competitors quickly exceed any challenges inherent in comparison with the general base of commercial and industrial taxpayers. Here, the parties have stipulated as to which entities are CSX's competitors. *CSX Transp., Inc.*, 720

requires it. Indeed, Eleventh Circuit's refusal to undertake the "Sisyphean burden of evaluating the fairness of the State's overall tax structure" is a refusal to effect the statute altogether. *CSX Transp., Inc.*, 720 F.3d at 871.

The functional approach is further commended by Congress's intent that 4-R "balance the needs of carriers, shippers, and the public; [and] foster competition among all carriers by railroad and other modes of transportation." 45 U.S.C.A. §§ 801 (b)(1)—(2). The functional approach honors this spirit of flexibility toward competing needs.

The functional approach will also protect States' ability to enact tailored tax exemptions. For instance, 2012 amendments to the Georgia tax code included a four-year phase-out for sales taxes on energy use for manufacturers, and discretionary

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F.3d at 869. There is no guarantee that future litigants will be able to do the same. This threshold question will inhere in every claim and will spawn a new subclass of 4-R Act litigation. Is an airline a competitor of a rail carrier? Is Overstock.com a competitor of Walmart?

exemptions for energy taxes for "projects of regional significance." Daniel French & Jesika Wehunt, *Revenue and Taxation: Sales and Use Taxes*, 29 GA. ST. U.L. REV. 112, 131—32 (2012). As a result, Caterpillar, Inc. built a manufacturing plant in the State. *Id.* at 132. Under the model adopted by the Eleventh Circuit, the competitor class for manufacturing projects of regional significance would be impossible to determine in advance, and ensuing litigation under any anti-tax discrimination law could eliminate the exemption's ability to achieve its goals.

B. This Court Should Require Calculation of the Actual Tax Amounts Levied, if It Adopts the Competitive Approach.

If this Court adopts the Eleventh Circuit's competitive approach, it should calculate the amounts paid under the excise tax levied on motor carriers and the sales tax imposed on rail carriers. This comparison will show that there is no actual discrimination against rail carriers.

Alabama subjects motor carriers' purchase of diesel fuel to a nineteen-cent-per-gallon excise tax, proceeds from which fund road maintenance. ALA. CODE ANN. § 40-17-325(a)(2). CSX and other rail

carriers are exempt from this excise tax. According to the uncontested evidence, the per-gallon after-tax price of the dyed diesel fuel used by rail carriers for the period covering December 25, 2009 was $2.0760. Def. Tr. Exh. 1. The after-tax price for the diesel fuel used by motor carriers was $2.1862. *Id.* Thus, simple math defeats CSX's discrimination claim: As the district court found, CSX's tax liability is actually *less* than that of motor carriers. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 892 F. Supp. 2d 1300, 1312 (N.D. Ala. 2012).

Contrary to the Eleventh Circuit's holding, courts are capable of comparing different tax liabilities. In fact, they already do this kind of calculation under 4-R. 49 U.S.C.A. § 11501(c) (directing district courts to grant 4-R relief only if "the random-sampling method known as a sales assessment ratio study" shows that "the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction."); *cf. Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (holding that the pertinent question in tax discrimination is "whether

the tax produces a forbidden effect," as opposed to mere formalism).

A basic calculation is enough to show that no actual discrimination has occurred. If CSX were subject to the excise tax to which motor carriers are subject—and thus required to pay for the maintenance of roads that it does not use—then its tax liability would be higher than it is now. *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 720 F.3d 863, 875 (11th Cir. 2013) (Cox, J., dissenting) ("I fail to see how a tax that places rail carriers in the same tax position as their competitors—or a better one—could threaten railroads' financial stability.").

C. This Court Should Note Relevant Differences between Rail Carriers and Other Interstate Carriers, If It Adopts the Competitive Approach.

This Court could also read "discrimination" narrowly by limiting it to inequality in treatment where there is "no reasonable difference" between taxpayers. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1108 (2011). Here, there are common sense differences between railway carriers, motor carriers, and water carriers. Rail carriers are not subject to the motor carriers' excise

tax because they do not use the roads whose maintenance it funds.

Contrary to CSX's argument that they it is discriminated against because motor carriers benefit from State highway maintenance funding, it makes no difference how the State spends money collected under these taxes:

> [T]hat burden is not a tax burden that the 4-R Act prohibits, and no tax affects that burden. Say, for example, that the State eliminated both the motor-fuel excise tax and the motor-carrier exemptions in the sales and use taxes, leaving a system in which rail carriers and motor carriers paid identical 4% taxes on the purchase and use of their fuel. By CSX's logic, even that totally equal tax scheme would disadvantage railroads in violation of the 4-R Act because railroads have higher overhead expenses. . . .
>
> The difference in right-of-way maintenance costs has no place in the comparison of tax burdens. That railroads must pay for their own tracks

> is the inherent burden of operating a transportation network on private rights-of-way. In other words, it is a fundamental competitive disadvantage that railroads face. Congress did not intend the 4-R Act to eliminate *all* of railroads' competitive disadvantages, only those created by taxes.

CSX Transp., Inc., 720 F.3d at 875 n.5 (Cox, J., dissenting).

CSX's argument is even less plausible because rail carriers rely on highways, too: motor carriers move rail-shipped goods to their final destinations. Additionally, Alabama treats rail carriers and water carriers differently because of the constitutional history of taxing interstate water carriers, a history that has led to their exemption from taxes in many States. Pet. for a Writ of Cert. at 5.

This Court can interpret 4-R's antidiscrimination provision narrowly in three ways so that it more faithfully adheres to the policy behind the statute, while still respecting the proper balance between federal interests and the State's traditional taxing power.

III. CSX'S INTERPRETATION THREATENS CRUCIAL STATE REVENUE.

CSX's interpretation of 4-R will grant rail carriers perpetual freedom from State sales taxes on fuel. Because CSX will likely resist paying the Alabama excise tax to which motor carriers are subject, it will escape paying any taxes at all on fuel purchases.

If upheld, the Eleventh Circuit's ruling below will annually cost the State of Alabama and its counties millions in lost taxes from CSX alone: CSX paid $4.108 million on local and state diesel fuel sales and use taxes in Alabama in 2006 and $3.022 million in 2007. Joint App'x at *36, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, No. 09-520, 2010 WL 3198848 (N.D. Ala. Aug. 12, 2010). The ruling will result in refund litigation from every major rail carrier in every State that collects sales tax from railroads on diesel fuel. In 2013, the Illinois Central Railroad Company ("ICCR") prevailed against the Tennessee Department of Revenue on an analogous claim, claiming that it was wrongly charged more than $9.4 million in sales tax on fuel from 2006–2010. *Ill. Cent. R.R. Co. v. Tenn. Dep't of Revenue*, 969 F. Supp. 2d 892, 896 (M.D. Tenn. 2013). The court in that case relied heavily on the Eleventh Circuit's reasoning in its holding permanently en-

joining the State from collecting any sales tax on fuel. The court's finding that all rail carriers are at an "overall disadvantage" by paying general sales taxes will ensure that no railroad pays tax for fuel in Tennessee again. *Id.* at 901.

Lost revenue from local governments would compound State losses. In 2010, CSX sought refunds of more than $5.8 million from local governments, including more than $1 million from Jefferson County and more than $3 million from the City of Birmingham. Brief of Alabama Education Association et. al in support of Respondents at 3 n.4, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, No. 09-520 (N.D. Ala. October 4, 2010). Such a loss presents a serious impediment to resourcing State and local services: the $2 million that CSX has claimed for 2007 could pay the salaries of fifty-five new teachers or forty-nine firefighters in Alabama. Aff. of Sean M. Craig in Support of Pl. CSX Transp. Inc.'s Mot. for Prelim. Inj. at 2, *CSX Transp. v. Alabama Dep't of Revenue*, No. 2:08-cv-655-UWC (N.D. Ala. May 29, 2008); National Education Association, *2012—2013 Average Starting Teacher Salaries by State*, http://www.nea.org/home/2012-2013-average-starting-teacher-salary.html; United States Department of Labor Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013, available*

at http://www.bls.gov/oes/current/oes_nat.htm#21-0000. Similarly, the $9.4 million refund demanded by ICRR would cover the cost of a school social worker and healthcare social worker for every county in Tennessee. National Education Association, *2012—2013 Average Starting Teacher Salaries by State*, http://www.nea.org/home/2012-2013-average-starting-teacher-salary.html; United States Department of Labor Bureau of Labor Statistics, *Occupational Employment and Wages, May 2013*, *available at* http://www.bls.gov/oes/current/oes_nat.htm#21-0000. At the local level, the $624,000 refund for which CSX sued the City of Montgomery in 2010 could have funded the city's Emergency Management Agency for the entire Fiscal Year 2011. Adopted Operating and Debt Service Budget, Ordinance # 38-2010, City of Montgomery, AL, Fiscal Year 2011 (September 28, 2010), *available at* http://www.montgomeryal.gov/index.aspx?page=657.

If applied nationwide to all rail carriers, this tax-free status will significantly hamper States' abilities to generate critical tax revenue.

The ramifications of the Eleventh Circuit's ruling are not limited to railroads. 4-R-type legislation across industries, when read broadly under the Eleventh Circuit's reasoning and applied to States

and localities across the country, could have devastating economic consequences. Broad interest group exemptions have contributed to serious "concern about the long-term prospects for sales tax revenue." G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 KY. L.J. 785, 799 (2011–12).

Of particular note is the longstanding success of e-commerce providers in escaping sales tax liability. Since 1998, Congress has preempted state and local authority from taxing Internet access services. Enacted because of alleged concerns that taxation would damage the Internet's growth and chill technological advances, the moratorium remains in place. The original purposes, however, no longer apply because the Internet has matured into a fundamental infrastructure that helps generate billions of dollars in annual revenues for businesses and service providers that use it.

The Senate Commerce Committee, reporting on the proposed 4-R bill, recognized that at the time, interstate railroads were "easy prey" for tax assessors and should be "accorded equal tax treatment with other taxpayers." S. Rep. No. 90-1483, at 2, 14 (1968). In stark contrast, CSX generated more than $12 billion in revenue and $2.9 billion in pre-tax earnings in 2013, yet it seeks to evade the basic sales

tax applied to interstate and local taxpayers of all sizes. CSX Corp., Annual Report (Form 10-K), 27, 92 (Feb. 12, 2014), *available at* https://www.sec.gov/Archives/edgar/data/277948/000027794814000011/csx-12272013x10k.htm.

CSX cannot claim that it is the target of discrimination simply because it pays the same business sales tax that Alabama imposes on everything from accordions to zoom lenses. By affirming the functional approach to tax discrimination, this Court would help uphold the traditional state power to tax and signal to Petitioners and all other industry sectors that Congress did not intend for the 4-R Act to grant giant national corporations most favored taxpayer status in perpetuity.

The uncertain future of State sales taxes presents an issue of concern in light of the fact that general sales taxes accounted for more than 30 percent of total State tax collection in 2013. U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2013 (2014). The great recession has multiplied the financial pressure on state governments: between 2008 and 2010, general fund revenues dropped more than $70 billion, and the effects of the recession continue to linger. National Association of State Budget Officers, *The Fiscal*

Survey of States: Spring 2014 34 (2014). Combined state spending, when adjusted for inflation, still has not recovered to pre-recession levels. *Id.* at ix. State budgets have seen only a 1.9% real increase since 1979, with the nominal increase in 2015 the lowest it has been since 2010. *Id.* at 2.

While States have offset losses through tax rate increases in the past, "continued rate increases are unlikely to be politically viable." Tarr, 100 KY. L.J. at 800. This is demonstrated by Alabama Governor Robert Bentley's 2012 statement "that he will 'absolutely not' raise taxes" despite a $100 million shortfall in use tax collection. J. Sims Rhyne, *Comment: A Useless Use Tax: Why Alabama Is the Poster Child for the Streamlined Sales and Use Tax Agreement*, 42 CUMB. L. REV. 337, 338 (2011-2012).

States must retain the power to craft their tax schemes in response to the policy challenges they face, rather than be confined to a mandated overbroad reading of a federal statute intended to cure other ills. This Court must afford States discretion to levy the general taxes on which they depend.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-553

IN THE

Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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STATEMENT OF INTEREST

The Tax Foundation respectfully submits this brief as *Amicus Curiae* in support of Respondent CSX Transportation, Inc., urging this Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.[1] That court properly held that Alabama's sales and use tax discriminates against railroads in violation of the 4-R Act by taxing railroads, but not the railroads' competitors, on their purchase or use of diesel fuel in the state.

The Tax Foundation is a non-profit research organization founded in 1937 to educate the public about sound tax policy. To this end, it disseminates information on taxes and promotes tax systems that are simple, fair, and conducive to economic growth. The Tax Foundation works to further this mission by educating the legal community on issues relating to tax law, by explaining tax law concepts to lawmakers and the public in an understandable and relevant manner, and by advocating that judicial decisions on tax law promote principled tax policy. To that end, this case raises concerns about the validity and effectiveness of federal laws enacted by Congress to protect interstate commerce from discriminatory and unduly burdensome taxation. The Tax Foundation has a significant interest in the outcome of this case because of the impact it could

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

have on how federal statutes prohibiting state and local tax discrimination are interpreted.[2]

INTRODUCTION

This case raises two important questions concerning how courts should determine whether a state tax discriminates against a taxpayer within the meaning of a federal statute that prohibits discriminatory state and local taxes: first, whether a court should evaluate the alleged discrimination by comparing the tax treatment of the taxpayer with its competitors or with the tax treatment of all other commercial and industrial businesses in the state; second, whether a court should evaluate the alleged discrimination by reference only to the challenged tax or by reference to other aspects of the state's taxing scheme as well.

The Court of Appeals for the Eleventh Circuit concluded that the evaluation of state tax discrimination under the 4-R Act should focus on the narrower inquiries – comparing the taxpayer with its competitors rather than with all commercial and industrial businesses and examining the particular tax without regard to other aspects of the state's taxing scheme. This conclusion faithfully implements the federal statutory prohibition on discriminatory taxation of railroads, and the Tax Foundation believes that the court's decision should be affirmed.

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[2] *Amicus Curiae* has authority to file this brief pursuant to Rule 37.3. As reflected in letters filed with the Clerk on July 10, 2014, petitioner and respondent have consented to the filing of this brief.

Resolution of the second question – whether the inquiry into state tax discrimination should focus on the tax at issue or should embrace other aspects of the state's tax regime – has potentially broad ramifications not only for application of the 4-R Act in other states but also for analogous inquiries under other federal statutes barring state tax discrimination. For this reason, the Tax Foundation's brief is addressed to that question.

SUMMARY OF ARGUMENT

Under the 4-R Act, and similar federal laws prohibiting state tax discrimination, the discrimination inquiry should be limited to the challenged tax and not include other aspects of the state's taxing scheme. The reason for confining the discrimination inquiry to the tax at issue, as the Eleventh Circuit properly recognized, is apparent: any other approach would be unworkable. Courts would be required to undertake complex and burdensome inquiries into the labyrinth of state and local tax regimes, comparing a wide variety of different state and local taxes, imposed on different taxpayers, on different tax bases, and at different rates. Many of these taxes contain specific exemptions and credits associated with particular activities or taxpayers. Courts would need to assess all of these variables in an effort to determine whether the economic incidence of different levies were equivalent – a monumental task in itself. Wholly apart from the "Sisyphean burden," *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (11th Cir. 2013), Pet. App. at 1a, that such inquiries would impose on taxpayers,

state tax administrators, and courts, the result of such inquiries would inevitably be indeterminate, because there are simply too many variables associated with each of these levies to render any comparison meaningful.

A rule confining the discrimination inquiry to the challenged tax does not mean that the inquiry into state tax discrimination must ignore the existence of taxes that are functionally identical but are imposed under different labels, such as sales and use taxes. But recognizing that form should not govern substance in matters of taxation does not justify reliance on more relaxed standards of equivalence embodied in various constitutional tests for determining whether different taxes offset or complement one another. Indeed, the "complementary tax doctrine," which is largely a creation of this Court's *dormant* Commerce Clause jurisprudence, is of no moment once Congress has affirmatively spoken under the Commerce Clause, as it has in the 4-R Act and in other federal statutes barring state tax discrimination. Moreover, even if complementary tax principles were applicable to this case, Alabama's excise tax on motor carriers' fuel purchases does not "complement" the sales tax on railroads' fuel purchases.

ARGUMENT

I. FAILURE TO LIMIT THE DISCRIMINATION INQUIRY TO THE PARTICULAR TAX IN DISPUTE WILL CREATE AN UNWORKABLE STANDARD THAT WILL UNDERMINE THE PURPOSE AND EFFECT OF THE 4-R ACT AND OTHER FEDERAL PROHIBITIONS OF STATE TAX DISCRIMINATION.

A. Discrimination under the 4-R Act

There is a simple and overriding reason why it is appropriate to confine the discrimination inquiry under the 4-R Act, and similar federal statutory bars to state tax discrimination, to the challenged tax at issue and not to broaden the inquiry to encompass other aspects of the state's tax regime: any other approach would be unworkable. As this case demonstrates, an inquiry not confined to the challenged exaction would inevitably lead to the evaluation of different taxes, imposed on different classes of taxpayers, on different tax bases, and at different rates. Indeed, even brief contemplation of the difficulties of applying such a standard on a nationwide basis lays bare the futility of undertaking such an effort.

In Alabama, of course, we know that railroads pay a sales tax on their purchases of fuel that motor carriers do not pay, ALA. CODE §§ 40-23-2(1); 40-17-325(B), and that motor carriers pay an excise tax on their purchases of fuel that railroads do not pay. ALA. CODE §§ 40-17-141; 40-17-329(A)(3). Railroads also pay a property tax that is centrally assessed whereas motor carriers pay a property tax that is

locally assessed. ALA. CODE §§ 40-21-1; 40-8-1(b); 40-11-1(b); 40-7-1(a).[3]

In Arizona, motor carriers pay a motor fuels tax on their purchases of motor fuel that railroads do not pay, ARIZ. REV. STAT. ANN. §§ 28-5606; 28-5609, and railroads pay a transaction privilege tax on their purchases of diesel fuel that motor carriers do not pay. ARIZ. REV. STAT. ANN. § 42-5061(A)(22). In addition, railroads pay property taxes that motor carriers do not pay, and motor carriers pay a vehicle license tax in lieu of property taxes that railroads do not pay. ARIZ. REV. STAT. ANN. §§ 42-14351; 42-12005(1); 28-5801.

In Arkansas, railroads are exempt from the state's sales tax on specified purchases that are not applicable to motor carriers, ARK. CODE ANN. §§ 26-52-301(3)(B)(iii); 26-52-426; 26-52-428; 26-53-137; ARK. ADMIN. CODE 006.05.212-GR-30(D); ARK. ADMIN. CODE 006.05.212-GR-52(C), (D); ARK. ADMIN. CODE 006.05.212-UT-9(C), (D) (railroad rolling stock used in interstate commerce; parts and labor used in the repair and maintenance of railroad parts and equipment), and motor carriers are exempt from the state's sales tax on specified purchases that are not applicable to railroads. ARK. CODE ANN. §§ 26-52-436; 26-52-520(a); 26-52-401(32) (truck tractors in excess of $9,150; semitrailers; and certain trucks

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[3] As a consequence, railroads and motor carriers are potentially exposed to different property tax burdens because of the different valuation methodologies employed in the two contexts, a problem that this Court has recognized. *See CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 522 U.S. 1 (2007) (different valuation methods may be scrutinized for their potentially discriminatory impact under the 4-R Act).

engaged in interstate commerce; communication equipment or other property installed on commercial trucks; and (c) leases of commercial trucks used in interstate transportation).

In California, railroads pay property taxes on real and personal property that motor carriers do not pay. CAL. CONST. art. XIII, § 19; CAL. REV. & TAX. CODE §§ 100.11; 11201; 11203; 11251; 10758. Motor carriers pay a fuel tax on diesel fuel and other motor fuel that railroads do not pay. CAL. REV. & TAX. CODE § 7360.

In Colorado, railroads are exempt from sales and use taxes on specified purchases that are not applicable to motor carriers, COLO. REV. STAT. § 39-26-710 ((locomotives, freight cars, railroad work equipment and railroad rolling stock purchased for use or used in interstate commerce by a railroad company, as well as the sale, storage, use or consumption of tangible personal property to be affixed as a component part of locomotives, freight cars, railroad work equipment and railroad rolling stock), and motor carriers are entitled to refunds of sales and use taxes on specified purchases that are not applicable to railroads. COLO. REV. STAT. § 39-26-113.5(1)(a) (2010 or newer truck tractor or semitrailer equipment exceeding a specified weight limit, purchased after July 1, 2011, and used in interstate commerce).

In Connecticut, railroads pay a gross earnings tax that motor carriers do not pay, and motor carriers pay the corporation business tax that

railroads do not pay. CONN. GEN. STAT. §§ 12-249; 12-251; 12-214(a)(2)(c); 12-214(a)(1).

In Florida, railroads pay a sales tax on purchases of diesel fuel that motor carriers do not pay, FLA. STAT. § 212.08(4)(a)(2) (tax based on the ratio of intrastate mileage to interstate or foreign mileage), and motor carriers pay a highway fuel tax that railroads do not pay. FLA. STAT. § 207.003 (tax based on each gallon of diesel fuel or motor fuel used). Railroads pay property taxes that motor carriers do not pay, FLA. CONST. art. VII, § (1)(b); FLA. ADMIN. CODE ANN. § 12D-2.002, and motor carriers pay motor vehicles taxes in lieu of property taxes that railroads do not pay. FLA. CONST. art. VII, § (1)(b); FLA. STAT. ANN. § 192.001(11)(d).

In Mississippi, railroads are subject to an industry-specific tax that does not apply to motor carriers, and motor carriers pay sales tax on their purchases of rolling stock that railroads do not pay. MISS. CODE ANN. §§ 27-65-107(a); 77-9-493(a). Railroads pay property taxes that do not apply to motor carriers, MISS. CODE ANN. § 27-35-303, and motor carriers pay motor vehicle ad valorem taxes that do not apply to railroads. MISS. CODE ANN. §§ 27-5-1 *et seq.*

In Missouri, railroads pay property taxes that are centrally assessed, and motor carriers pay property taxes that are locally assessed. MO. ANN. STAT. §§ 138.420; 137.095.

In New Jersey, railroads pay franchise tax and special municipal assessments that do not apply to motor carriers. N.J. REV. STAT. §§ 54:29A-1 *et seq.*

In North Carolina, motor carriers pay a highway use tax that does not apply to railroads. N.C. GEN. STAT. §§ 105-187.1 *et seq.* Railroads pay sales tax on their purchases of rolling stock and qualify for a refund of sales taxes on certain purchases, neither of which applies to motor carriers. N.C. GEN. STAT. §§ 105-164.13(32); 105-164.3(23); 105-164.14 (purchases of railway cars and locomotives used in interstate commerce and purchases of related fuel, lubricants, repair parts, and accessories).

In Oregon, motor carriers pay highway use and fuel use taxes that do not apply to railroads, OR. REV. STAT. §§ 825.474; 319.530, and railroads pay property taxes that do not apply to motor carriers. OR. REV. STAT. §§ 308.515; 803.585

In Rhode Island, motor carriers qualify for an exemption to the sales taxes on purchases of rolling stock that does not apply to railroads. R.I. GEN. LAWS § 44-18-40 (trucks, trailers and busses used exclusively in interstate commerce).

In South Carolina, railroads are subject to specified sales taxes and exemptions that do not apply to motor carriers. S.C. CODE ANN. REGS. § 117-311.2; S.C. CODE ANN. § 12-36-2120(20) (taxable: track and signal; exempt: railroad cars, locomotives and their parts, and monorail cars and their engines, motors, and parts; lumber used for repair); S.C.

CODE ANN. REGS. 117-311.6. Motor carriers pay a maximum sales tax of $300 on specified purchases that is inapplicable to railroads. S.C. CODE ANN. § 12-36-2110(A) (motor vehicles, trailers and semitrailers).

In Washington and Wisconsin, railroads pay property taxes that motor carriers do not pay. WASH. REV. CODE §§ 84.12.200(2), 84.12.270, 84.12.380; 84.36.595(2); WIS. STAT. §§ 76.01, 76.02(6), 76.03; 70.112; 341.25.

So where does the inquiry that this Court directed the parties to consider into "other aspects of the State's tax scheme" begin and where does it end, and to what avail? Since there frequently is no "apple-to-apple" comparison, courts will be forced to determine which "oranges" are sufficiently equivalent to the "apple" in question that they may be counted and which levies may be disregarded altogether. Thus, in addition to the question of whether we limit our inquiry in the instant case to Alabama's sales and use tax on railroads' fuel purchases, or extend it to include Alabama's excise tax on motor carriers' fuel purchases, should one compare Colorado's railroad rolling stock exemption from sales and use taxes with the weight-based exemption for motor carriers' purchases of certain motor vehicles? Is Connecticut's tax on railroads' *gross earnings* really equivalent to its tax on motor carriers' *net income*? Is Florida's sales tax, which applies to certain purchases by railroads equivalent to its special excise tax, which applies to motor carriers? And, by the same token, is Mississippi's sales tax, which applies to certain purchases by

motor carriers equivalent to its special excise tax, which applies to railroads? Are there any taxes in New Jersey imposed on motor carriers that are arguably equivalent to the franchise tax and special municipal assessments that apply to railroads?

Moreover, even if one determines which "oranges" should be compared to the challenged "apple," one must then determine precisely what burdens these different levies impose on their respective competitors, in light of their different characteristics, tax bases, and tax rates. This is a Herculean task at best, as Respondent's brief clearly shows (Br. Resp. 32-38). Suffice it to say, given the difficulty of identifying the taxes that should be included in the comparative inquiry, coupled with the enormously complex calculus of the actual impacts of different levies, the ultimate conclusion regarding "equivalence" is likely to be questionable at best. *See generally* Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405 (1986) (cited on this point in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341 n.7 (1996)). For these reasons, Alabama's simplistic dollar comparison of the sales and fuel excise taxes – "truckers do not pay the sales and use tax for on-road diesel fuel because that fuel is subject to a different, higher excise tax" (Pet. Br. 7, 20) – does not begin to capture the true complexity of the equivalence question and should be rejected. The same point could be made about a comparable inquiry under other states' tax regimes.

The short answer to all of these questions, as the court below and virtually every other court

confronting the question have recognized, is that there are simply too many variables associated with different levies to render any comparison meaningful, and the nationwide application of the state's suggested standard would create administrative and judicial chaos. *See* Pet. App. 1a *et seq.* (reproducing opinion below); *Union Pac. R.R. v. Minn. Dep't of Revenue*, 507 F.3d 693 (8th Cir. 2007); *Burlington N., Santa Fe Ry. v. Lohman*, 193 F.3d 984 (8th Cir. 1999); *Burlington N. R.R. v. Comm'r of Revenue*, 509 N.W.2d 551 (Minn. 1993); *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991); *Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir. 1991); *Kansas City S. Ry. v. McNamara*, 817 F.2d 368 (5th Cir. 1987). As Judge Posner observed in an opinion rejecting an inquiry beyond the tax at issue:

> Should the taxing authority be allowed to rebut the prima facie case of discrimination by showing that taxes on equivalent services eliminate any discrimination against rail carriers? Maybe the tax is on railroad boxcars . . . but the taxing authority presents evidence that there is an equal tax on truck trailers. Would the burden then shift back to the railroad to produce evidence that the apparent neutrality of the tax system considered as a whole is spurious? If so, this case may have a long life.

Superior, 932 F.2d at 1187.

B. Discrimination under Other Federal Statutes Barring State Tax Discrimination

Although this case involves the 4-R Act's prohibition of state tax discrimination against railroads, there are other federal statutes barring state tax discrimination that raise essentially the same question raised by this case: "Whether, in resolving a claim of unlawful tax discrimination ... a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision." A brief consideration of how other courts – including this Court – have resolved this question in the context of other federal anti-discrimination statutes reinforces the argument for limiting the judicial inquiry to the challenged tax in this case.

1. State Tax Discrimination Against Out-of-State Electricity

The Tax Reform Act of 1976 (the "Electricity Act"), 15 U.S.C. § 391, prohibits the imposition or assessment of "a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The Electricity Act provides that "a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391.

In *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), this Court examined the question of whether New Mexico's generation or transmission of electricity, in conjunction with an offsetting credit against the state's gross receipts tax on in-state electrical sales, violated the Electricity Act. The New Mexico tax-credit provisions assured that locally consumed electricity was not burdened by the electricity generation tax, whereas the bulk of electricity generated in New Mexico for out-of-state sale was subject to the tax because there was no offsetting credit, as in the case of local sales of electricity.

Despite the discriminatory effect of the tax when viewed separately, New Mexico argued that the inquiry into tax discrimination should extend beyond the challenged tax to take into account other aspects of New Mexico's taxing scheme. Thus, the state contended that there was no discrimination because sales of electricity outside the state were subject only to the electricity tax and not to the gross receipts tax while sales of electricity in the state were subject to both taxes.

In determining the standards by which it should evaluate the question of whether the New Mexico tax was discriminatory, this Court declined to consider "other aspects of the State's tax scheme." Instead, the Court focused solely on the challenged tax finding that it violated the statutory prohibition against state tax discrimination. In adopting the narrower inquiry, the Court reasoned that "the federal statutory provision is direct[ed] specifically at a state tax 'on or with respect to the generation or

transmission of electricity,' not to the entire tax structure of the State." *Snead*, 441 U.S. at 149. In the Court's view, "[t]o look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." *Id.*, 441 U.S. at 149-150. *See also Nevada v. City of Burbank*, 691 P.2d 845, 848 (Nev. 1984) (invalidating an energy tax that applied to out-of-state consumers but did not apply to in-state consumers: "We reject the notion that Nevada's citizens are taxed in different forms thereby compensating for the added tax burden imposed by paragraph two on Cities. This contention is unsound simply because § 391 eliminates its availability.")[4]

2. State Tax Discrimination Against Electronic Commerce

The Internet Tax Freedom Act ("ITFA") prohibits "discriminatory taxes on electronic commerce." 47 U.S.C. § 151 (1998) NOTE. The statute defines a "discriminatory tax" as:

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[4] The United States attempts to diminish the significance of the Court's holding in *Snead*, arguing that, unlike the 4-R Act, the Electricity Act was enacted to invalidate the tax at issue in that case. (*See* U.S. Merits Br. 26 n.9.) However, that distinction has no bearing on this case. While the enactment of the 4-R Act might not have been directed at a specific tax, the statute speaks in terms of "another tax" and not any combination of taxes. The focus of both statutes is on a particular tax, and there is nothing in the language of the 4-R Act suggesting that a discriminatory tax should be assessed for fairness against other aspects of a state's tax structure.

> (A) any tax imposed by a State or political subdivision thereof on electronic commerce that –
>
> ...
>
> (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

In *Performance Marketing Association v. Hamer*, 998 N.E.2d 54 (Ill. 2013), the Illinois Supreme Court considered the question whether an Illinois statute that imposed a tax collection obligation on retailers that sold their products through referrals by persons utilizing "a link on the person's Internet website" violated ITFA's bar against tax discrimination. In the court's view, the plain language of ITFA branded Illinois's tax collection obligation as discriminatory because it targeted out-of-state Internet retailers that enter into agreements with others for *online* "performance marketing" while imposing no such obligation on out-of-state retailers that enter into performance marketing contracts with *offline* Illinois print publishers and over-the-air broadcasters.

The Illinois Department of Revenue did not dispute that the statute made no mention of traditional, "offline" performance marketing contracts, but argued that the Illinois tax collection provisions were not discriminatory when viewed more broadly because other statutory provisions

imposed a use tax collection obligation for "offline" performance marketing.

Like this Court in *Snead*, and other courts construing statutory bars on discrimination under the 4-R Act, the Illinois Supreme Court refused to look beyond the challenged statute to consider other aspects of the state's tax regime in determining whether the Illinois tax statute was discriminatory. Focusing specifically on the challenged taxing statute, the court concluded that it violated the federal prohibition against discrimination, "by singling out retailers with Internet performance marketing arrangements for use tax collection, the Act imposes discriminatory taxes within the meaning of the ITFA." *Hamer*, 998 N.E.2d at 59.

3. State Tax Discrimination Against Motor Carriers

The Motor Carrier Act ("MCA"), 49 U.S.C. § 14502 (1980), which is patterned after the 4-R Act, prohibits states from imposing property taxes on motor carriers at a higher ratio than that of other commercial and industrial taxpayers. Although the MCA's prohibition of discriminatory taxes is limited to property taxes, even within this context courts have refused to go beyond a challenged tax (on personal property) to consider "other aspects of the State's tax scheme," namely, the tax on real property, in determining whether the tax under consideration was discriminatory.

In *ABF Freight System, Inc. v. Tax Division of Arkansas Public Service Commission*, 787 F.2d 292, 298 (8th Cir. 1986), for example, the court refused to

look beyond the tax on personal property (and consider, as well, the tax on real property) in determining whether the personal property tax discriminated against motor carriers. The court observed that it had recognized "that courts properly may compare the assessment ratios of only like categories of property," and that "it is clear that Congress intended that under the MCA 'property of the same type' is to be compared in determining whether a state taxation scheme discriminates against motor carriers." *Id.* at 298; *see also Arkansas-Best Freight Sys., Inc. v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982) (same).

In sum, just as courts have properly limited their inquiries to the tax at issue in the context of the 4-R Act, they also have done so in the context of other federal statutes barring state tax discrimination. And they have done so for a good reason. The very same difficulties that courts would encounter under the 4-R Act, if they were to look beyond the challenged statute to consider other "aspects of the State's tax scheme," would likewise confront them under other federal statutes forbidding state tax discrimination. The recognition of this problem, and the judicial response to it – including this Court's response in *Snead* – reaffirms and reinforces the fundamental point that any other approach would be unworkable.

* * *

In light of the enormous burdens associated with determining the existence of state tax discrimination when that determination requires

consideration of taxes other than the tax at issue, it is hardly surprising that this Court and courts throughout the country have consistently declined to consider taxes other than the allegedly discriminatory tax itself in determining whether a state tax violates a federal statutory prohibition on state tax discrimination. There is no justification for departing from this approach for reasons that this Court has recognized: "Courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes." *Minneapolis Star v. Minn. Comm'r of Revenue*, 460 U.S. 575, 589-90 (1983) (footnote omitted).

II. ALABAMA'S DISCRIMINATORY TREATMENT OF RAILROADS UNDER ITS SALES AND USE TAX CANNOT BE JUSTIFIED UNDER THE COMPLEMENTARY TAX DOCTRINE.

Even if courts generally may not inquire into "other aspects of a State's tax scheme" for determining whether a tax discriminates against railroads under the 4-R Act, Alabama and its *amici* contend that courts may nevertheless undertake such an inquiry to determine whether an allegedly discriminatory tax is "complemented" by another tax so that the two levies considered together do not create a discriminatory tax regime. In their view, the discriminatory character of Alabama's sales and use tax on railroads disappears if one takes into account the admittedly different but purportedly

"complementary" tax that motor carriers pay under the motor fuel excise tax.

These contentions fail for two reasons. First, the complementary tax doctrine emanates from this Court's constitutional jurisprudence and has no role to play in determining whether a state tax is discriminatory under a federal statute barring state tax discrimination, as this Court has explicitly recognized. Second, even if the complementary tax doctrine were applicable in this case, the sales tax on diesel fuel and the motor fuel excise tax do not complement each other under the Court's contemporary understanding of the complementary tax doctrine.

A. The Complementary Tax Doctrine Is Inapplicable to this Case.

This Court has recognized the complementary tax doctrine as "a specific way of justifying a facially discriminatory tax" in the context of *federal constitutional* challenges to such taxes. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 102 (1994) (emphasis supplied). The doctrine, however, simply has no application to a tax that allegedly violates a *federal statutory* prohibition against state tax discrimination. Indeed, the Court affirmed this proposition in *Arizona Public Service Co. v. Snead*, *supra* (discussed at pp. 15-16), in which it struck down New Mexico's discriminatory tax against out-of-state electricity. In *Snead*, the Court rejected New Mexico's contention, reflecting the complementary tax doctrine, that the validity of the tax should be considered in light of "other aspects of

the State's tax scheme." Thus the Court dismissed New Mexico's suggestion that "the statutory provision is no more than a prohibition of a tax that is invalid under the constitutional test of the Commerce Clause" that purportedly required "examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of State." *Id.* at 149. Instead the Court declared that:

> whatever the validity may be of the Commerce Clause test advanced by [New Mexico] ..., the federal statutory provision is directed specifically at a state tax "on or with respect to the generation or transmission of electricity," not to the entire tax structure of the State. To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it.

Id.

B. Even if the Complementary Tax Doctrine Were Applicable to this Case, Alabama's Motor Fuel Tax Is Not Complementary to the Discriminatory Sales Tax on Railroads.

Under the Court's complementary tax doctrine, an apparently discriminatory tax on interstate commerce will be upheld in light of a "substantially equivalent" levy imposing a

comparable burden on local commerce. *Oregon Waste*, 511 U.S. at 102 (the complementary tax doctrine is not a "doctrine unto itself" but "merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means").

Under the Court's contemporary understanding of the complementary tax doctrine, a discriminatory tax will be saved from constitutional condemnation only if the state can: (1) identify the interstate tax burden for which it is compensating; (2) show a roughly approximate tax on interstate and intrastate commerce; and (3) show that the two taxes are "substantially equivalent," meaning "sufficiently similar in substance to serve as mutually exclusive 'proxies' for each other." *Id.* at 103.

The paradigmatic example of a tax that falls within the complementary tax doctrine is a compensating use tax imposed on goods purchased from outside the state. The tax discriminates on its face against interstate commerce because it generally applies only to out-of-state goods, but, in fact, it is nondiscriminatory when considered in conjunction with a functionally identical sales tax imposed at the same rate on similar goods purchased within the state. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). In *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), this Court observed that "the State has the burden to show that the requirements of the compensatory tax doctrine are clearly met" and expressed its doubt that "such a showing *can ever be*

made outside the limited confines of sales and use taxes." *Id.* at 344 (emphasis supplied).

The critical inquiry in determining whether a tax is a valid complementary tax focuses on the question of whether the two taxes are "substantially equivalent" such that they are "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *See, e.g., id.* at 332-33; *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 170 (1999) ("Our cases hold that a discriminatory tax cannot be upheld as 'compensatory' unless the State proves that . . . the taxes are similar enough 'in substance' to serve as 'mutually exclusive' proxies for one another."); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) ("To ensure that the State is indeed merely imposing countervailing burdens on comparable transactions, we have required that the taxes . . . be imposed on 'substantially equivalent events,'" *quoting Maryland v. Louisiana*, 451 U.S. 725 (1981)). The Court has further observed that "actual incidence upon the same class of taxpayers is a necessary condition for a finding that two taxes are complementary." *Fulton Corp.*, 516 U.S. at 340 n.6.

Under these criteria (and in particular, the analytical framework established by *Oregon Waste*), it is clear that Alabama's motor fuel excise tax does not "complement" Alabama's discriminatory sales and use tax on railroad fuel under the Court's complementary tax doctrine. Respondent's brief demonstrates in detail why this is so (Resp. Br. 44-50), and we will not repeat that analysis here. We simply note that the sales tax and motor fuel excise tax differ in a number of fundamental respects that

belie any assertion that they are functional equivalents to one another:

- The taxes are imposed for different purposes – the sales tax is a general revenue measure that supports the state's general fund, whereas the motor fuel excise tax is used to fund the infrastructure that the state provides for the motor carriers. The motor fuel excise tax may thus be viewed as a user charge inuring peculiarly to the taxpayers' benefit. Consequently, the two levies do not satisfy the essential requirement of *Oregon Waste* that complementary taxes impose equivalent burdens on taxpayers, because the motor fuel excise tax is essentially repaid to the motor carriers in the form of roads whereas the railroads have to fund their own infrastructure from after-tax receipts.
- The taxes are imposed at different rates – the sales tax is a percentage based tax of 4 percent, and the motor fuel excise tax is a per-gallon flat fee of 19 cents per gallon. Hence any effort to determine whether the two taxes "roughly approximate" each other is fraught with difficulty.[5]

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[5] The sales tax on a railroad's purchases of fuel can go up when the excise tax on motor carriers remains constant, this occurring on account of the day-to-day fluctuating prices of diesel fuel. The per-unit motor fuel tax varies only and directly with the number of gallons purchased by a motor carrier. In

- The taxes are not "mutually exclusive 'proxies' for each other," as they are imposed on different activities, at different rates, and for different purposes.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

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contrast, the percentage-based sales tax on railroads varies directly with not just the number of gallons purchased, but also the market conditions impacting the price of diesel fuel.

AMICUS CURIAE BRIEF

No. 13-553

In the Supreme Court of the United States

ALABAMA DEPARTMENT OF REVENUE, ET AL.,
Petitioners,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF TENNESSEE, ARIZONA, GEORGIA, HAWAI'I, IDAHO, INDIANA, IOWA, MINNESOTA, NEVADA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, and WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a State "discriminates against a rail carrier" in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales and use tax but grants exemptions from the tax to the railroads' competitors.

2. Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. §11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.

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INTEREST OF THE AMICI CURIAE

The Amici States have a vital interest in how this Court resolves the two questions presented. Railroads carry on extensive operations and maintain a significant presence in these states in terms of personnel and property. State and local governments are thus obliged to provide essential services. Sales-and-use taxes[1] are important revenue sources in most states, especially in those that have no general personal income tax.

The States seek to have the 4-R Act applied as Congress intended, namely, as a shield against predatory state taxation of out-of-state interests where such interests have little or no political clout. Congress never intended the 4-R Act to provide railroads with a weapon for attaining "most-favored-taxpayer" status. As Alabama correctly argues, the best protection against discriminatory tax treatment of railroads is for their fate to be tied to that of a large and local class of taxpayers that have both the incentive and the political clout to keep the tax burden as low as possible. The States thus support Alabama in urging the adoption of a comparison class of general commercial and industrial taxpayers.

But the Amici States' focus here is on the second question presented. Allowing courts to consider other aspects of a State's tax scheme, which tax the same activity, accomplishes these same goals, even if a

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[1] Sales tax and use tax are actually separate complementary taxes. Use tax applies only when or to the extent that a sales tax has not been imposed at the point of sale. For convenience they are referred to collectively here as "sales-and-use" taxes.

comparison class of direct competitors is used. States often tax railroads under one provision and motor carriers under another provision to meet the administrative requirements of the International Fuel Tax Agreement ("IFTA"). Indeed, all 50 states and the District of Columbia impose an on-road motor-fuel excise tax as distinct from a sales tax.[2] Forty-five of the 50 states and the District of Columbia impose a general sales tax on the purchase or use of tangible personal property.[3] Purchases of fuel for highway use, however, are exempt from the general sales-and-use tax in 42 of these 45 states. John F. Due & John L. Mikesell, *Sales Taxation: State and Local Structure and Administration* 85 (Urban Inst. Press 2d ed. 1994). Under current law, the ability of any of these 42 states to impose a generally applicable sales-and-use tax on fuel used by railroads is impeded by the potential exposure to 4-R Act challenges. The Amici States therefore have a substantial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit was wrong not to consider Alabama's motor-fuel excise tax on motor carriers as justification for its exemption of motor carriers (and water carriers) from the sales-and-use tax imposed on fuel purchases by railroads. In a challenge under the 4-R Act to a state tax exemption, where the state

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[2] *See* Federation of Tax Administrators, *State Motor Fuels Tax Rates*, available at http://www.taxadmin.org/fta/rate/mf.pdf.

[3] *See* Federation of Tax Administrators, *State Sales Tax Rates*, available at http://www.taxadmin.org/fta/rate/sales.pdf.

merely exempts one competitor from a generally applicable sales-and-use tax but imposes a different tax on exactly the same activity, courts should make a side-by-side comparison of the respective tax burdens on the same activity. These tax burdens can be easily and empirically quantified, and a comparison of the two is neither massive in scope nor difficult to undertake. If the respective burdens are reasonably equivalent, or if the burden on the railroads is lighter, there can be no tax discrimination. This Court implicitly endorsed such an approach in *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S.Ct. 1101 (2011) (*CSX I*), and it should expressly adopt it here.

A court's consideration of different taxes on the same activity serves the 4-R Act objective of ensuring non-discriminatory tax burdens while accommodating needed flexibility in State taxation. Granting exemptions from generally applicable taxes is a traditional tool, and it allows States to respond to administrative necessity. The fuel purchased or used by motor carriers cannot be subjected to a percentage-based sales-and-use tax because IFTA requires fuel taxes on trucks to be measured by consumption. It is therefore nearly impossible for a State to tax railroads and trucks in exactly the same way, because there is no system for railroads equivalent to IFTA.

In cases where 4-R Act challenges have been made to taxes that actually targeted railroads or were imposed on activities in which only railroads engage, courts have rightly declined to evaluate the overall fairness under a State's entire tax scheme of the burdens imposed on the various activities engaged in by two transportation modalities with different

business models. Such an evaluation would be massive and difficult, and it would be inappropriate; such taxes are almost *per se* discriminatory under subsection (b)(4) of the 4-R Act. But exemptions are not *per se* discriminatory, and there is no reason to apply this rule to an exemption-based challenge where the respective tax burdens on a specific activity can be empirically quantified.

Tennessee's experience with exemption-based challenges under the 4-R Act demonstrates that the tax burden on railroads cannot be adjusted to the railroads' satisfaction. The legislature's attempt to respond to a district-court ruling that Tennessee's sales-and-use tax exemption was discriminatory under the 4-R Act, by extending the exemption to railroads, has been met with litigation challenging the new law. This response by the railroads serves to emphasize that courts must consider other aspects of a State's taxing scheme when offered as sufficient justification for a State tax exemption.

ARGUMENT

Recent litigation in Tennessee (discussed more fully in § II, *infra*) starkly illustrates the nature of CSX's claim. In 2013, a federal district court held that Tennessee was violating the 4-R Act in the way it taxed diesel-fuel consumption.[4] At the relevant time, railroads and water carriers paid a 7% sales or use tax on diesel fuel, which in 2010 amounted to 16.69¢ per

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[4] *Illinois Central R.R. Co. v. Tennessee Dep't of Revenue*, 969 F.Supp.2d 892 (M.D. Tenn. 2013), *appeal pending*, No. 13-6348 (6th Cir.).

gallon. Motor carriers were exempt from that tax but separately paid a 17¢ per gallon motor fuel tax.[5] So, although the railroads paid the same tax as water carriers and less than motor carriers, the railroads successfully claimed that they were being discriminated against in violation of the 4-R Act because motor carriers were exempted from the particular tax imposed on the railroads.

The following year, the Tennessee Legislature appeared to give the railroads what they wanted, exempting fuel purchases by railroads from the sales-and-use tax, and instead imposing on them the same per-gallon fuel tax imposed on motor carriers. But that did not satisfy the railroads, four of which—including CSX—filed suit alleging that the new tax scheme violates the 4-R Act.

In short, then, CSX and its fellow railroads claim that railroads are being discriminated against if they are subject to Tax A and their competitors are subject to Tax B, and that they are also being discriminated against if they are subject to the same Tax B as their competitors. But both propositions cannot be true, and here neither is true. If one is "discriminated" against when one is treated worse than another, one cannot be discriminated against when one is treated the same as or better than another.

The railroads claim that they are by arguing *not* about their actual tax burdens (for the purchase of

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[5] The litigation covered the taxing years 2006-2010. The motor fuel tax was 17¢ that entire time. The sales tax on railroads per gallon in those years equates to 15.14¢, 15.66¢, 22.22¢, 12.77¢, and 16.69¢, respectively.

diesel fuel) but about the structure of the state tax code. Such an argument, though, exalts form over substance. The 4-R Act prohibits actual discrimination against railroads—not mere different treatment within the structure of a tax code.[6]

I. IN AN EXEMPTION-BASED CHALLENGE UNDER SUBSECTION (b)(4) OF THE 4-R ACT, COURTS MUST BE ALLOWED TO CONSIDER OTHER ASPECTS OF A STATE'S TAX SCHEME AND NOT FOCUS SOLELY ON THE CHALLENGED TAX PROVISION.

CSX I did not hold that a state discriminates against a railroad in violation of subsection (b)(4) of the 4-R Act whenever it applies a tax to railroads but exempts a competitor. To the contrary, the decision indicated that such an exemption does not violate the 4-R Act if the State "offers a sufficient justification." One "sufficient justification" is when the State exempts the railroad's competitors because those competitors are subject to a different tax on the very same activity. And the exemption is all the more justified when the state tax regime—taxing railroads in provision A and motor carriers (for example) in provision B—allows the States to meet the administrative requirements of IFTA.[7]

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[6] For this reason, while equivalent burdens certainly do constitute sufficient justification for an exemption, equivalence is not required. And Alabama has offered extensive justifications for its water-carrier exemption. *See* Br. Pet. at 8-10, 20, and 37.

[7] As discussed in the Interest of the Amici Curiae section, this discussion assumes that the Court holds that the relevant comparison class is the railroads' direct commercial competitors.

A. The Mere Existence of an Exemption for a Railroad's Competitors Cannot Constitute Tax Discrimination Under Subsection (b)(4) of the 4-R Act.

In *CSX I*, this Court held only that "a state excise tax that applies to railroads but exempts their interstate competitors is subject to challenge under subsection (b)(4)." 131 S.Ct. at 1109. "[The Court did] not address whether CSX should prevail in that challenge—whether, that is, Alabama's taxes in fact discriminate against railroads by exempting interstate motor and water carriers." *Id.* at 1114; *see id.* at 1107 n.5. Indeed, the Court expressly disavowed any notion that a tax on railroads was discriminatory merely because a competitor was exempt from that tax.

> This conclusion does not . . . turn railroads into "most-favored-taxpayers," entitled to any exemption (or other tax break) that a State gives to another entity. We hold only that § 11501(b)(4) enables a railroad to challenge an excise tax or other non-property tax as discriminatory on the basis of the tax scheme's exemptions.

Id. at 1109 n.8. This language is irreconcilable with the proposition that discrimination can be based on the mere existence of an exemption. The lower court was therefore wrong to "look only at the sales-and-use tax with respect to fuel to see if discrimination has

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We fully agree with Alabama, however, that the relevant comparison class under subsection (b)(4) is the same as it is under subsections (b)(1)-(3), namely, the general class of commercial and industrial taxpayers.

occurred." Pet. App. at 13a (quoting *Union Pacific R.R. Co. v. Minnesota Dep't of Revenue*, 507 F.3d 693, 695 (8th Cir. 2007)); *see also* Pet. App. at 22a-23a (Cox, C.J. dissenting) (criticizing this approach as "simplistic").

CSX I provides substantial guidance on the discrimination determination under subsection (b)(4): "Whether the railroad will prevail—that is, whether it can prove the alleged discrimination—depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers." 131 S.Ct. at 1109 n.8. If the mere existence of an exemption were determinative, no justification could be sufficient. But this Court has made plain that courts have a responsibility to evaluate the sufficiency of the justification offered by defending states:

> Discrimination cases sometimes do raise knotty questions about whether and when dissimilar treatment is adequately justified. . . . [D]ifficult issues can emerge when, as here, States provide certain entities with tax exemptions. . . . Congress has directed the federal courts to review a railroad's challenge; and . . . we would flout the congressional command were we to declare the matter beyond us.

CSX I, 131 S.Ct. at 1114. The necessary implication is that there can, in fact, be sufficient justification and that lower courts must evaluate the justification offered. And one perfectly reasonable justification for exempting railroads' competitors from a tax on fuel is that those competitors pay the same (or more) in taxes on fuel consumption under a different provision of the tax code.

B. There Is No Tax Discrimination When a Reasonably Equivalent Tax Burden Is Imposed on the Same Activity.

Subsection (b)(4) of the 4-R Act asks whether a tax "discriminates against a rail carrier." As the Court explained in *CSX I*, "[d]iscrimination is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.' Black's Law Dictionary 534 (9th ed. 2009)[.]" 131 S. Ct. at 1108. Because the railroads claim discriminatory tax treatment, the fundamental question is: How much tax do railroads and motor carriers, respectively, pay the state when they purchase, use, or consume a gallon of diesel fuel? That is the beginning and the end of the inquiry, for it tells us whether railroads are treated less favorably. It is also an inquiry that courts are perfectly capable of making.

Here, the facts are as straightforward as they can possibly be: two quantifiable taxes imposed by the same taxing authority on exactly the same activity, with neither competitor being subject to the tax paid by the other. Which is higher: tax A or tax B? The comparison that is called for is neither massive nor difficult. Pet. App. at 24a (Cox, C.J. dissenting). The answer to this question is easily, quickly, inexpensively, empirically, and precisely calculated. And if the answer shows that the tax burden on railroads is roughly the same or lower than the burden on their competitors, there is no discrimination under

the 4-R Act.[8] As a simple matter of common sense and dictionary definitions, a state is not discriminating against railroads if it taxes them at, say, 16¢ a gallon for diesel fuel and taxes its competitors at, say, 20¢ a gallon. Yet that is precisely what CSX is contending and the Eleventh Circuit held.

A court cannot possibly determine whether a state has "sufficient justification" for its tax exemption without engaging in such an inquiry. Furthermore, while state tax exemptions *can* be discriminatory, *CSX I*, 131 S.Ct. at 1109, a court must be allowed to consider whether a particular tax exemption actually works merely to offset a tax burden placed elsewhere. Matters of administrative necessity also support consideration of equivalent taxes on identical activities. All 48 contiguous states and bordering Canadian provinces are parties to IFTA, the purpose of which is to simplify the collection and reporting of taxes on motor fuel used by motor carriers operating in more than one jurisdiction. State participation in IFTA is sanctioned by federal legislation. *See* 49 U.S.C. §§ 31701 to 31707. IFTA requires that the fuel use tax imposed by member jurisdictions be measured by the consumption of fuel by a motor vehicle. *See* 49 U.S.C. §§ 31701(2), 31705. Motor carriers register and file tax

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[8] Such a comparison of respective tax burdens is entirely consistent with other parts of the 4-R Act, which prohibit both the assessment of rail-transportation property at a *higher* ratio than that for commercial and industrial property and the levy or collection of property tax on rail-transportation property that *exceeds* the rate for commercial and industrial property. 42 U.S.C. § 11501(b)(1), (3). The very concept of whether one thing is "higher" than or "exceeds" another is without meaning absent a quantitative comparison.

returns in a single base jurisdiction, which, in turn, is responsible for distributing the tax proceeds to other jurisdictions in which the carrier operates. Motor carriers receive in each jurisdiction a credit or refund for taxes paid on fuel used outside the jurisdiction where it was purchased. There is no similar multi-state agreement with respect to fuel purchased, used, or consumed by railroads. It is thus virtually impossible for states to tax railroads and trucks exactly the same way on their respective purchases and uses of fuel.[9]

C. An Evaluation of the Aggregate Fairness of Overall Tax Regimes as Applied to Different Industries Is Neither Necessary Nor Appropriate in an Exemption-Based 4-R Act Challenge.

Rather than follow this Court's instructions in *CSX I*, the Eleventh Circuit relied on circuit-court precedents and declined to compare the respective tax burdens. Pet. App. at 13a. But the comparison called for here is unlike the one contemplated by these circuit-court decisions, i.e., one that would require an evaluation of the tax burdens of a state's entire tax scheme on the various activities engaged in by two transportation modalities with different business models. Courts have rightly declined to undertake that kind of evaluation—but for reasons having no bearing on whether Alabama's motor-fuels tax can justify the exemption of motor carriers from its sales-and-use tax.

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[9] See discussion at Section II, *infra*.

In the first instance, such an evaluation is fraught with uncertainty and extremely burdensome, if not impossible. More importantly, it is inappropriate; the cases in which courts have declined that evaluation involved taxes targeted at railroads or at activities in which only railroads engage. *See, e.g., Trailer Train Co. v. Missouri State Tax Comm'n*, 929 F.2d 1300, 1302-03 (8th Cir. 1991); *Burlington Northern R.R. Co. v. City of Superior*, 932 F.2d 1185, 1186-88 (7th Cir. 1991); *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). Such taxes are almost *per se* discriminatory under subsection (b)(4). *See Kansas City Southern Ry. Co. v. Koeller*, 653 F.3d 496, 510 (7th Cir. 2011); *City of Superior*, 932 F.2d at 1186-88. These taxes are targeted at railroads as entities—at the activity of railroading. The source of discrimination is the tax itself, and the level of the burden it imposes is thus irrelevant.

But the tax at issue here does not target railroads, and it is not imposed on activities in which only railroads engage. Indeed, the challenge here is to a tax exemption. There is simply no reason for the *per se* rule to be applied in an exemption-based challenge where one can empirically quantify the respective tax burdens on a specific activity in which both modalities engage.

D. An Inquiry into the Allocation of Tax Proceeds Has No Place in 4-R Act Tax-Discrimination Analysis and Is Contrary to Congressional Intent.

Respondent has previously argued that the sales-and-use tax on railroads cannot be equated with the fuel-excise tax on motor carriers because proceeds from

the latter are devoted to highway construction and maintenance, whereas (in some states) proceeds from sales taxes paid by railroads are not allocated to railroads, which must bear the expenses of maintaining their own private rights-of-way. But this argument does not address relative tax burdens, and what the 4-R Act forbids are discriminatory tax burdens. The Act says nothing about a state's allocation of tax proceeds, and there is no suggestion in the 4-R Act that a determination of tax discrimination can or should be made by reference to the manner in which a state chooses to allocate its tax proceeds. *See Atchison, Topeka & Santa Fe Ry. Co. v. Arizona*, 78 F.3d 438, 443 (9th Cir. 1996) ("The 4-R Act reaches only tax burdens and not tax benefits."), *abrogated on other grounds by CSX I*, 131 S.Ct. 1101.

The best evidence of congressional intent is the language of the 4-R Act, specifically the first three subsections, which deal with property taxes. These subsections define tax discrimination in terms of assessment ratios and tax rates. They say nothing about tax benefits or the allocation of proceeds. Indeed, under subsections (b)(1), (b)(2), and (b)(3), a railroad cannot state a claim by alleging that every penny of property-tax proceeds derived from railroads is allocated to highway maintenance and construction. This is because if property-tax rates are not discriminatory, then there is no violation regardless of how the proceeds, as a matter of policy, are spent. There is no authority for the notion that Congress intended for tax discrimination under subsection (b)(4) to be determined any differently. Pet. App. at 27a n.5 (Cox, C. J., dissenting) (explaining that the burden of maintaining private rights-of-way is not a tax burden

and that Congress did not intend the 4-R Act to eliminate a fundamental competitive disadvantage). The 4-R Act was never intended to be a tool for micromanaging state legislatures' expenditures of their tax dollars, and this Court should decline to apply it in that manner.

Respondent's argument confuses the issue of tax discrimination with fundamental differences in business models and the expenses inherent in operating a transportation system on private rights-of-way. Public roads and railroads are not analogous. Public roads are public commodities on which all persons depend for many things, including general commerce and the mere ability to move from one place to another without trespassing on private property. States thus have a vital interest in maintaining a system of public ways conducive to economic activity and for the general benefit of all persons, including railroads. The obligation of the States to maintain these public ways was never intended by Congress to be an Achilles heel by which railroads, acting under the 4-R Act, could elevate themselves to the status of "most-favored taxpayers."

II. THE TENNESSEE EXPERIENCE ILLUSTRATES THE DIFFICULTY STATES ENCOUNTER IN ATTEMPTING TO EQUALIZE THE TAX BURDENS ON RAILROADS AND MOTOR CARRIERS.

In *Illinois Central Railroad Co. v. Tennessee Department of Revenue*, 969 F.Supp.2d 892 (M.D. Tenn. 2013), *appeal pending*, No. 13-6348 (6th Cir.), the district court held that Tennessee's imposition of sales-and-use tax on the railroad's purchase and use of diesel

fuel was discriminatory because motor carriers were exempted—even though motor carriers paid even higher taxes on diesel fuel under the state's motor-fuel excise tax. The district court reached this conclusion despite undisputed evidence that motor carriers had been subject to a separate fuel excise tax since 1941, six years before the enactment of the sales-and-use tax; that motor carriers, from 1941 through 2010, had paid more tax per gallon of fuel than railroads had paid in every year except one; and that Tennessee's obligations under IFTA, which is essentially mandated by federal law, made it virtually impossible for fuel purchases by the two transportation modes to be taxed exactly the same way.

In response to that ruling, the Tennessee General Assembly enacted the Transportation Fuel Tax Equity Act, effective July 1, 2014. *See* 2014 Tenn. Pub. Acts, ch. 908 (codified at Tenn. Code Ann. §§ 67-3-1401 to -1407 (2014 Supp.)). The Act exempts fuel purchases by railroads from sales-and-use tax and imposes on them the same per-gallon fuel tax imposed on motor carriers.

Under the new law, the amount of tax owed to Tennessee is determined by multiplying the per-gallon tax rate by the number of gallons consumed in Tennessee. This scheme does not change the taxation of motor carriers, or the amount of revenue received from them, because under IFTA motor carriers are taxed in each state on all gallons consumed in that state. The amount of revenue received from railroads, however, is impacted because the Commerce Clause prohibits states from taxing fuel consumed in a state when sales taxes have been paid on its purchase in

another state. Railroads in Tennessee are thus allowed a credit for the amount of sales taxes paid elsewhere on fuel ultimately consumed in Tennessee.[10] The net effect of the new law, designed to remove the discrimination identified by the district court, is that railroads are treated preferentially to motor carriers, which must pay the diesel tax on all gallons of fuel consumed in Tennessee regardless of where it is purchased. This loss in revenues will impact the short-line railroads and the communities those railroads serve in Tennessee because tax revenues collected from railroads' fuel purchases are used to fund the State's short-line railroad track and bridge rehabilitation program.

Nevertheless, on June 30, 2014, CSX Transportation Co., Illinois Central Railroad Co., and BNSF Railway Co. all filed 4-R Act actions in federal district court challenging the Act on grounds that water carriers, which continue to pay sales tax on fuel purchases, are exempt from the Act and alleging that the Act targets railroads. Norfolk Southern Railway Co. filed a substantially similar action shortly thereafter.[11]

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[10] Illinois, Oklahoma, and Arizona, all of which are within a locomotive's range of Tennessee without the need to refuel, impose sales taxes on fuel purchases by railroads.

[11] These new cases are *CSX Transortation Co. v. Tennessee Department of Revenue* (No. 3:14-cv-01400) (M.D.Tenn.); *Illinois Central Railroad Co. v. Tennessee Department of Revenue* (No. 3:14-cv-01401) (M.D.Tenn.); *BNSF Railway Co. v. Tennesee Department of Revenue* (3:14-cv-01399) (M.D.Tenn.); and *Norfolk Southern Railway Co. v. Tennessee Department of Revenue* (No. 3:14-cv- 01472) (M.D.Tenn.).

This experience demonstrates that the tax burden on railroads cannot be adjusted to the railroads' satisfaction, even if they receive preferential treatment. It also demonstrates the true nature of the so-called "discrimination" to which the railroads claim to be subjected. They are not claiming that, in any substantive way, they are being treated worse than their competitors with respect to taxation on diesel fuels. Their complaint, in the end, is that the state is imposing these respective taxes in two separate provisions of its tax code.

But the 4-R Act addresses genuine discrimination—treating one group worse than another group. Section (b) begins by listing "acts [that] unreasonably burden and discriminate against interstate commerce." And subsection (b)(4) proscribes the imposition of "another tax that discriminates against a rail carrier." The Act does not purport to address, much less mandate, how states should go about structuring their tax code and imposing tax obligations in the first place. So when the railroads claim "discrimination" on the basis of a tax exemption afforded to their competitors, and a State offers an equivalent tax on the same activity as justification for declining to provide that exemption to rail carriers, courts *must* be allowed to look beyond the exemption and to consider those different taxes placed on railroads and their competitors.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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